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No. 15685

**In the United States Court of Appeals
for the Ninth Circuit**

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF
GEORGE WILLIAM GRAHAM, DECEASED, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLEE

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**In the United States Court of Appeals
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No. 15685

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF
GEORGE WILLIAM GRAHAM, DECEASED, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON*

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Appellant brought this action against the United States under the provisions of the Federal Tort Claims Act¹ in the United States District Court for the District of Oregon (R. 1-10). The jurisdiction of the District Court was invoked under 28 U.S.C. 1346(b), *infra*, p. 35 (R. 1). On May 9, 1957, the District Court entered judgment for the United States (R. 62-63). On May 17, 1957, appellant filed a motion to amend findings of fact and objections to conclusions of law, under Rule 52(b) of the Federal Rules of Civil Procedure (R. 63-67). On May 27, 1957, the District Court entered an

¹ 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680.

order denying the motion and objections (R. 68). On July 23, 1957, notice of appeal was filed (R. 69). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.²

STATEMENT OF THE CASE

This action arose out of the death of George William Graham while engaged as a carpenter foreman in the performance of a contract entered into between his employer and the United States.

1. *The Undisputed Facts.*³ On June 23, 1954, Robert C. Larson, doing business as the Larson Construction Company, entered into a contract with the Corps of Engineers of the United States Army for the construction and repair of portions of the Bonneville Dam project, a government-owned and controlled facility located on the Columbia River (R. 50-51). Included in this facility are a powerhouse, located between the Oregon shore of the river and Bradford Island, and a spillway dam, located between the island and the Washington shore of the river (R. 50). The dam contains 18 bays, numbered consecutively from the fishway bay on the Washington shore (Bay 1) to the fishway bay on Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which opens and closes in a vertical direction (R. 50). When closed, the gates rest on the top of the so-called "ogee" section (*i.e.*, the upper line of the submerged stationary portion of the dam) (R. 50).

² The action was consolidated below with, and received the same disposition as, *Winton v. United States* and *Tobias v. United States*. The appeals in these latter actions (Nos. 15686 and 15687) have been stayed, pursuant to stipulation approved by this Court, pending the outcome of the appeal in this case.

³ None of the basic facts, as found by the District Court, are challenged by appellant. Most of them were stipulated (R. 34-46).

The contract between Larson and the Corps of Engineers had specific reference to the construction of a cofferdam and the restoration of baffles on the south half of the spillway baffle deck (R. 51). The baffle deck is a concrete structure on the bed of the river, extending downstream across the width of the dam (R. 50). Concrete blocks, known as "baffles", are built into it for the purpose of dissipating the energy of the water discharged through the dam and reducing the downstream velocity thereof (R. 50-51). During the interval between the completion of the dam in 1938 and the execution of the contract, the baffle deck and baffles had become eroded by the flow of water (R. 51).

The contract contemplated that the construction of the cofferdam, which was incidental to the repair of the baffles (R. 149), would be undertaken by Larson without interruption of the normal power generation of the powerhouse (R. 51). It further contemplated that the construction work would be commenced while water was being necessarily discharged through the spillway dam, until such time as the flow of the river had receded to a point where it could be handled entirely through the powerhouse (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On July 14, 1954, the Corps of Engineers gave notice to Larson to proceed with the performance of the contract, and the latter thereupon started the preliminary marshaling of necessary equipment and construction materials (which he was contractually obligated to furnish, along with all necessary labor) (R. 52). On August 13, 1954, Larson was notified that, in accord-

ance with the provisions of the contract, the construction work on the water was to be started within ten days (R. 52). On the same day, Larson conferred with Alfred M. Capps, the project superintendent in charge of the operation of the Bonneville dam, regarding the possibility of closing a number of the gates of the spillway dam during the preliminary construction work on the cofferdam (R. 52). As a result of this conference, the gates in Bays 11 through 17 were immediately closed (R. 52).

Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson and his acting superintendent, Harry Claterbos, with respect to their plans for carrying out the contract (R. 53). As project engineer, Leonti's duties included inspection of the project during the construction to ascertain that Larson was meeting the contract specifications, and to serve as liaison between Larson and the government employees responsible for the operation of the dam (R. 53). Leonti informed Larson that any requests to close additional gates of the spillway dam should be directed to him, and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the plans and specifications of the contract, a part of the cofferdam was to consist of a timber crib in Bay 9, which was to rest on the ogee curve and to run from the top of that curve at right angles to the face of the dam (R. 53). Because the contract drawing reflected the cross-section of the ogee as originally constructed, and because he thought it might subsequently have become eroded to some extent, Larson determined

that it was necessary to take soundings to establish its true cross-section at the time (R. 53-54). The contract itself neither required nor referred to the taking of such soundings (R. 54).

On August 18, Larson advised Leonti of his intention to take the soundings on August 20 (R. 54). Leonti was further advised that Larson proposed to accomplish this objective by pushing a barge into Bay 9, off the side of which the soundings would be taken (R. 54). Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 p.m. on August 20 in order to facilitate the operation (R. 54). At no time did Larson, or his representatives, request that any of the other open gates be closed (R. 54).

Leonti forwarded the request to the operations division of the dam, and it was fulfilled (R. 54). On August 19, Larson's superintendent, Claterbos, undertook a reconnaissance trip of the area in a tugboat for the purpose of ascertaining whether the proposed manner of taking the soundings was safe (R. 54-55). On the basis of this reconnaissance trip, and his own personal observation of the situation, Larson determined for himself that it was safe (R. 55). The advice of the Government on the matter was not sought (R. 55).

Shortly before 2:00 p.m. on August 20, Larson's tug MULEDUZER set out from the Bradford Island shore of the river, pushing Larson's barge FOREST No. 12 (R. 55). The barge was made fast to the tug by four steel lines (R. 56). Two of these lines ran from the stern mooring bits of the barge to the forward winches of the tug (R. 56). The other lines ran from the stern mooring bits of the barge to the stern winches of the tug (R. 56).

On board the tug or barge were six Larson employees: two crew members (Magnor Larson and Coles) and four members of the sounding party (Graham, Boylan, Tobias and Lewis) (R. 55). Tobias, a civil engineer, was in charge of the operation and none of the others in the sounding party had any control over the manner in which it was to be conducted (R. 55). All of the personnel involved, as well as all of the equipment utilized, had been selected by Larson alone (R. 55).

The tug and barge headed downstream from Bradford Island, came about in the middle of the river, and then proceeded upstream toward Bay 9 (R. 56). As the barge reached that Bay, it veered in a northerly direction and its port bow struck a pier located between Bays 8 and 9 (R. 56). As a result, the bow was stoved in and, as water came in through the hole, the barge moved in front of Bay 8 and the other open bays to the north (R. 56). Both the barge and tug swamped and sank; the former being broken to pieces (R. 56). All those aboard were thrown in the water and, with the exception of Coles, were killed.

2. *Proceedings Below.* On April 18, 1955, this suit was brought under the Tort Act to recover damages for Graham's death (R. 1-10). On December 3, 1956, a pretrial order was entered, which raised the issue as to whether appellant's remedy was under the Oregon Wrongful Death Act, O.R.S. 30.020, or the Oregon Employers' Liability Act, O.R.S. 654.325 (R. 19-33). Appellant contended that he was entitled to rely on the Employers' Liability Act, *infra*, pp. 36-39, notwithstanding the fact that the death of his decedent had occurred on navigable waters (R. 30). The Govern-

ment's position was that actions for damages for death of a workman on navigable waters within the territorial limits of the State of Oregon are governed by general maritime law; and that, as a consequence, only the Wrongful Death Act could be applied (R. 30-31).⁴

On March 29, 1957, Judge Solomon filed an opinion in which he ruled that the Employers' Liability Act was inapplicable for two separate and distinct reasons: (1) the Government was not responsible for the work being performed by Larson; and (2) the Act could not be constitutionally applied to this case (R. 47-48). Judge Solomon further determined that appellant had failed to prove that the Government was negligent in any respect and that, therefore, he was not entitled to recover under the Oregon Wrongful Death Act (R. 48).

On May 9, 1957, the District Court filed its findings of fact and conclusions of law (R. 48-62). In addition to the above-mentioned facts, the court found (R. 56-59) that (1) the proximate cause of the accident had been the turbulent condition of the water in the spillway basin; (2) this condition had been open, apparent and obvious to Larson, the tugboat operator and his other employees; (3) the difference in elevation of the water in the turbulent area opposite the open gates in the spillway basin, as compared with the area opposite the closed gates, also had been visible and obvious; (4) Larson had been an independent contractor and had not operated under the supervision, control and direction of the United States; (5) the Government had had no control over the details, manner or method by which the work under the contract was to

⁴The pretrial order reserved the question as to whether the Employers' Liability Act was inapplicable for some other reason (R. 32).

be accomplished, but had been interested only in insuring a general result in conformity with the contractual specifications and had retained a mere right to inspect the work during its progress in order to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner and means by which the sounding operation would be carried out, and no employee of the United States participated in the operation or gave Larson or any of his employees directions or orders with respect thereto; (7) no employees of the Government had been engaged in the sounding operation and there had been no intermingling of employees of the United States with the Larson employees in connection with the work being performed at the time of Graham's death; and (8) the Government had not been in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident. All of these findings are accepted by appellant on the appeal.

In its conclusions of law, the court reiterated its previous determination that the Employers' Liability Act was inapplicable and ruled that, since the United States was neither negligent itself nor chargeable with the negligence of Larson and his employees, liability under the Oregon Wrongful Death Act and the Federal Tort Claims Act had not been established (R. 60-61).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Oregon Employers' Liability Act could be constitutionally applied by an Oregon court.

2. Whether, apart from the constitutional obstacles to its application, the Oregon Employers' Liability Act extends to this case.

3. Whether the District Court's finding that there was no negligence on the part of Government employees is "clearly erroneous."

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Oregon Employers' Liability Act are set forth in the appendix to this brief, *infra*, pp. 35-39.

ARGUMENT

The District Court Correctly Determined that Appellant Had Not Established Liability on the Part of the United States

Introduction and Summary

28 U.S.C. 1346(b), *infra*, p. 35, confers jurisdiction upon the district courts over claims based upon the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 2674 provides that the assumed liability is only "in the same manner and to the same extent as a private individual under like circumstances." It is the position of the United States that the judgment of the court below is fully in accord with this statutory mandate; that, on the undisputed facts of this case, a "private individual under like circumstances" would not be liable to appellant.

In Points I and II we show that the court below correctly held that, for two separate and independent reasons, the Oregon Wrongful Death Act, and not the Oregon Employers' Liability Act, governs this action. In the first place, as Judge Solomon recognized, the

admiralty jurisdiction extends to an action bottomed, as this one, upon an alleged tort consummated on the navigable waters of the United States and occasioning the death of an individual whose presence on those waters had a maritime purpose. And, under a long line of decisions of the Supreme Court of the United States, liability for an alleged tort within the admiralty jurisdiction is determined by reference to general maritime law, rather than the law of the state within the territorial boundaries of which the navigable waters were encompassed. This is so irrespective of whether the suit is brought on the admiralty side of a federal court; on the civil side of a federal court exercising its diversity jurisdiction; or in a state court assuming jurisdiction under the "saving to suitors" clause of the Judiciary Act of 1789. Applying these principles, the federal courts have uniformly invoked maritime law in actions under the Tort Claims Act where the locality of the alleged tort was maritime.

While, under the maritime law there was no right of recovery for wrongful death caused by negligence, state wrongful death statutes which adopt the common law standard of care are given effect in admiralty and may serve as a foundation for an *in personam* suit to recover damages for a death occurring on navigable waters within the limits of the state. Thus, had this case arisen between private persons, an Oregon state court (or a federal court exercising its admiralty or diversity jurisdiction) could have looked to the Oregon Wrongful Death Act and the jurisprudence developed thereunder. In these circumstances, the same Act affords appellant's remedy here.

Insofar as the Oregon Employers' Liability Act is concerned, the Supreme Court of the United States has

consistently ruled that local statutes which work a material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international or interstate relations, may not be invoked in the disposition of claims based upon maritime torts. Since the Employers' Liability Act imposes a standard of care markedly different from the common law standard, accepted by the Wrongful Death Act and the maritime law alike, these rulings bar resort to it here. The Oregon Supreme Court itself has evidenced an understanding that the Employers' Liability Act cannot apply to torts which are maritime in character.

We further show in Point II that appellant would not be assisted even if there were no constitutional obstacles to the application of the Employers' Liability Act. In terms, as well as by reason of the construction given it by the Oregon Supreme Court, the Act cannot serve as a basis for imposing liability in circumstances where (1) the defendant was not in charge of, responsible for, or even engaged in the work performed by the decedent at the time of his death; and (2) the independent contractor who employed the decedent, in full charge of the work and the conditions under which it was being performed, affirmatively determined that those conditions posed no undue risk.

In Point III we show that there is no merit to appellant's attack on the finding of the District Court that the death of appellant's decedent was not the result of any violation by government employees of the reasonable care requirement of the common law. Far from being "clearly erroneous", that finding was compelled by the undisputed evidence—which reflects that the

negligence, if any, was that of the decedent's employer and the decedent himself. Under the provisions both of the Tort Act and Oregon law, the negligence of Larson is not chargeable to the United States.

I

The Oregon Employers' Liability Act Could Not Constitutionally Be Applied to This Case

A. Appellant's Claim Is Grounded Upon An Alleged Maritime Tort

It has long been established that "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 Wall. 20, 36. See also *Leathers v. Blessing*, 105 U.S. 626; *Gonsalves v. Morse Dry Dock and Repair Co.*, 266 U.S. 171; *Swayne and Hoyt v. Barsch*, 226 Fed. 581 (C.A. 9); *Buren v. Southern Pacific Co.*, 50 F. 2d 407 (C.A. 9), certiorari denied, 284 U.S. 638; *Benedict on Admiralty*, 6th Ed., Section 127, and cases there cited. Otherwise stated, admiralty jurisdiction "has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred." *Wilson v. Transocean Air Lines*, 121 F. Supp. 85, 92 (N.D. Cal.) (characterized as an "excellent opinion" by this Court in *Higa v. Transocean Air Lines*, 230 F. 2d 780, 784, certiorari dismissed, 352 U.S. 802). And, in the application of this "locality" test, the critical inquiry always has been not "where the wrongful act or omission had its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." *Ibid.* See also *The Plymouth*, *supra*; *Atlee*

v. *Packet Co.*, 21 Wall. 389; *Smith v. Lampe*, 64 F. 2d 201 (C.A. 6), certiorari denied, 289 U.S. 751; *Benedict*, *supra*, Section 128 and cases there cited.⁵

Giving effect to this "locality test", it is clear that the purported tort here comes within the admiralty jurisdiction. Irrespective of where the negligent acts or omissions alleged in the complaint may have taken place, the fact remains that the death of appellant's decedent (*i.e.*, the consummation of the alleged tort) concededly occurred on the navigable waters of the United States.

While the "locality test" is the sole basis for determining whether an alleged tort is maritime in nature, it might be noted at this juncture that the presence of the decedent on the Columbia River had a special relation to commerce and navigation, and thus was not a matter of mere "local concern".⁶ The sounding operation in which decedent was engaged at the time of his fatal injury was being conducted in the furtherance of the construction of the cofferdam contemplated by the contract between his employer and the Corps of Engineers. This construction, in turn, was incidental to the principal contractual undertaking: the restoration of the baffles on the spillway baffle deck of the Bonneville Dam (R. 149).

The Bonneville Dam project was recognized as an aid to navigation by the Oregon Supreme Court in *Atkinson v. State Tax Commission*, 156 Or. 461, 463, 62 P. 2d

⁵ In *Smith v. Lampe*, for example, admiralty jurisdiction was sustained in circumstances where a barge stranded on the shore of Lake Erie, allegedly as the result of the negligent signaling by defendant with the horn of his automobile during a fog.

⁶ The relevance of this consideration will be seen at a subsequent point. See n. 10, *infra*, p. 20.

13, 67 P. 2d 161, affirmed, 303 U.S. 20. In any event, its status as such is manifest from Section 1 of the Act of August 20, 1937, c. 720, 50 Stat. 731, 16 U.S.C. 832, which provides in relevant part:

*For the purpose of improving navigation on the Columbia River, and for other purposes incidental thereto, the dam, locks, power plant, and appurtenant works under construction on August 20, 1937, at Bonneville, Oregon and North Bonneville, Washington (called Bonneville project in this chapter), shall be completed, maintained and operated under the direction of the Secretary of War and the supervision of the Chief of Engineers, * * *. [Emphasis supplied.]*

Cf. *Ashwander v. T.V.A.*, 297 U.S. 288, 328-330.⁷

Apart from this existence of a general relationship between the Bonneville project and the furtherance of commerce and navigation, the specific objective served by the baffles under repair was the reduction of the downstream velocity of the water which was discharged through the spillway dam (R. 50-51). To the extent to which the fulfillment of this objective had been impeded by baffle erosion, the restoration work necessarily was of immediate and direct benefit to maritime commerce.

⁷Compare also *The Blackheath*, 195 U.S. 361 (claim grounded upon damage to beacon in navigable waters comes within the admiralty jurisdiction). *The Raithmoor*, 241 U.S. 166 (same holding with respect to incomplected beacon); *Doullut and Co. v. United States*, 268 U.S. 33 (same holding with respect to pile clusters driven into bottom of navigable river for the purpose of aiding navigation).

B. Being At Variance With The Characteristic Features Of The Maritime Law, The Employers' Liability Act Cannot Be Invoked Where A Maritime Tort Is Involved.

1. As the Supreme Court noted in *The Lottawanna*, 21 Wall. 558, 575, the declaration in Article III of the Constitution that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction" had reference "to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Southern Pacific Co. v. Jensen, 244 U.S. 205, determined that the considerations detailed in *The Lottawanna* prohibit common law courts, in the exercise of jurisdiction over civil maritime causes under the "saving to suitors" clause of Section 9 of the Judiciary Act of 1789, 1 Stat. 76, 77, from invoking state statutes "which work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." On this basis, the Supreme Court invalidated in *Jensen* the application of a state workmen's compensation statute to an injury sustained by a longshoreman engaged in unloading a vessel at a wharf in navigable waters, observing that the statute attempted to give a remedy "of a character wholly unknown to the common law."

To the same effect are *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *Robins Dry Dock Co. v. Dahl*, 266 U.S. 449; *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479; *Messel v. Foundation Co.*, 274 U.S. 427, 434; *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647; and *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406. In the *Hawn* case, for example, suit was brought on the civil side of a federal district court to recover damages for a personal injury sustained while the plaintiff was working on a ship in navigable waters. Jurisdiction was based upon diversity of citizenship. Rejecting the defendant's argument that Hawn's rights were governed by Pennsylvania law, the Supreme Court observed [346 at 409]:

True Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features * * *." *Panama R. Co. v. Johnson*, 264 U.S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any

substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them.

Also rejected was the defendant's reliance upon *Erie v. Tompkins*, 304 U.S. 64, as a basis for applying state law.

2. In *Western Fuel Co. v. Garcia*, 257 U.S. 233, 240, 242, the Supreme Court observed that, although "it is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law," where such death "results from a maritime tort committed on navigable waters, within a State whose statutes give a right of action on account of death by wrongful act the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." This is because "the subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, *when following the common law*, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242 [Emphasis supplied].⁸

Since the Oregon Wrongful Death Act imposes nothing more than common law liability [*Thompson v. Union Fishermen's Co-op. Produce Co.*, 128 Or. 172,

⁸ When the death of a seaman is involved, the Jones Act [Section 333 of the Merchant Marine Act, 1920, 41 Stat. 1007, 46 U.S.C. 688] provides, of course, the exclusive remedy and supersedes all state statutes which might otherwise apply. *Lindgren v. United States*, 281 U.S. 38.

174, 273 Pac. 953], it thus may be constitutionally applied (in federal and state courts alike) in cases arising from deaths on navigable waters within that state. The Oregon Employers' Liability Act, is, however, an entirely different matter.

As the court below pointed out in *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D. Ore.), and as is stressed by appellant, the Employers' Liability Act represents a radical departure from the "reasonable care standard" which has long measured liability both at common law and under the maritime law⁹—requiring, as it does, the employer to use "every device, care and precaution which it is practicable to use for the protection and safety of life and limb." Indeed, the sharp distinction between the two statutes in this regard has been referred to by the Oregon Supreme Court. See *e.g.*, *Fromme v. Lang & Co.*, 131 Or. 501, 504-505, 281 Pac. 120; *Hoffman v. Broadway Hazelwood*, 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814.

In *Robins Dry Dock Co. v. Dahl*, 266 U.S. 449, suit had been brought in a New York state court to recover damages for personal injuries sustained by the plaintiff while engaged in repair work on a vessel lying in navigable waters within New York. The complaint alleged that the plaintiff had fallen in the hold when a plank scaffold on which he was standing had broken. It further alleged that his employer had failed to furnish a safe place to work and a safe scaffold, as re-

⁹See *e.g.*, *Jacob v. New York City*, 315 U.S. 752; *The Joseph B. Thomas*, 86 Fed. 658 (C.A. 9); *Jeffries v. DeHart*, 102 Fed. 765 (C.A. 3).

quired by the New York Labor Law. In instructing the jury, the trial court noted that maritime law controlled the action, but went on to state that, in determining whether there had been negligence, the duty imposed upon the defendant by the Labor Law could be taken into consideration. Reversing the resulting judgment in the plaintiff's favor, the Supreme Court stated [266 U.S. at 457]:

The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant-Smith Porter Ship Co. v. Rhode*, 257 U.S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis v. Luchenbach S. S. Co.*, 247 U.S. 372, 382; *Union Fish Co. v. Erickson*, 248 U.S. 308; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259. They would not have been different if the accident had occurred at San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material. See *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511; *New Orleans & N.E.*

R.R. Co. v. Harris, 247 U.S. 367, 371; *American Railway Express Co. v. Levee*, 263 U.S. 19, 21.¹⁰

See also, to the same effect, *Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (N.D. Ohio) (Ohio Employers' Liability Act); *Payne v. Jackson Forwarding Co.*, 290 Fed. 936, 938 (C.A. 5) (Florida Hazardous Employment Act); *Young v. Clyde S. S. Co.*, 294 Fed. 549, 550-551 (S.D. Fla.) (same); *Turner v. Wilson Line*, 142 F. Supp. 264 (D. Mass.) (Massachusetts Death Statute, because of its punitive nature, is inconsistent with the "characteristic features of the general maritime law" and accordingly can not be invoked with respect to a maritime tort). And in *Hawkins v. Anderson & Crowe*, 84 Or. 94, 101, 164 Pac. 556, the Oregon Supreme Court stated with reference to the Employers' Liability Act itself:

It may be that the rights of the parties are to be determined by the maritime law: *Schuede v. Zenith S. S. Co.* (D.C.), 216 Fed. 566. If so, the provisions of the Employers' Liability Law * * * are certainly not applicable.

¹⁰ As heretofore shown (pp. 13-14, *supra*), the presence of appellant's decedent on navigable waters at the time of his death had a "direct relation to navigation and commerce." Compare in this connection *Mark v. Portland Gravel Co.*, 130 Or. 11, 278 Pac. 986. There, the Oregon Workmen's Compensation Statute was held applicable to an injury sustained by the engineer of a dredge which was engaged in scooping sand from the bed of a navigable river. Resting its decision on the fact that the dredging operation was being conducted solely for the purpose of obtaining sand for commercial use, the court indicated its awareness that a different result would have been required had the purpose been to deepen the channel as an aid to navigation.

C. The Principles Governing Actions Between Private Parties On Alleged Maritime Torts Apply Equally To Tort Act Suits.

It follows from the foregoing that the court below was correct in its determination that the Oregon Employers' Liability Act can play no part in a Tort Claims Act suit grounded upon an alleged maritime tort. True enough, as appellant emphasizes, the Tort Act adopts the law of the place where the negligent act or omission took place. 28 U.S.C. 1346(b). Cf. *Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62 (C.A.D.C.), certiorari denied, *sub nom. Union Trust Co. v. United States*, 350 U.S. 911. But all that means is that the court below was required to look to those principles which Oregon could and would have applied had the litigation been between private parties. As has been seen, in the circumstances of this case, the Oregon courts (as well as those of all other jurisdictions) would be required to measure a private defendant's liability by the standard of care prevailing under general maritime law (*i.e.*, the common law standard). In other words, no serious conflict of laws problem can arise in actions on maritime torts because of the constitutional mandate of uniformity.

All of the reported Tort Act cases involving maritime torts are in accord with this analysis. In *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4), for example, suit was brought under the Act to recover damages for the loss of the plaintiff's vessel, which allegedly had sunk as the result of the negligent marking by the United States of a wreck located in navigable waters within the territorial limits of Vir-

ginia. On its determination that the loss had been proximately caused by negligence on the part of both the Government and the navigator of the vessel, the Fourth Circuit applied the divided damages rule peculiar to admiralty law. Referring, *inter alia*, to *Southern Pacific v. Jensen*, *supra*, the court reasoned that, with respect to torts within the admiralty and maritime jurisdiction, Virginia law of necessity adopts that rule.

In *Russell, Poling & Co. v. United States*, 140 F. Supp. 890 (S.D.N.Y.) the plaintiff sought to recover under the Tort Act for the stranding of their barge while under tow in navigable waters within New York. The Government filed a conditional third party complaint against the tug owner for contribution and the latter moved for judgment on the pleadings; asserting that New York law applied and that under that law there is no right of contribution between joint tortfeasors. Denying the motion, the court stated [140 F. Supp. at 892]:

It is true that the plaintiffs' claim against the United States of America under the Federal Tort Claims Act is to be determined "in accordance with the law of the place where the act or omission occurred." However, the claim here asserted by the plaintiffs for damages to the barge through stranding is a maritime tort. The third party claim—that of fault of Connors while it was towing the barge in the channel—likewise is a maritime claim. Since the claims asserted are maritime torts, substantive admiralty principles would be applied by the New York courts and this would include the right of contribution where admiralty

permits it between joint tort feasons [Citing *inter alia*, *Hawn v. Pope & Talbot, Inc.*, *supra*].

See also *State Road Department v. United States*, 78 F. Supp. 278, 280 (N.D. Fla.); *Moran v. United States*, 102 F. Supp. 275, 278-279 (D. Conn.).

Dye v. United States, 210 F. 2d 123 (C.A. 6), cited by appellant, is hardly to the contrary. The question as to whether Kentucky law inconsistent with the general maritime law could be applied was not even mentioned, let alone decided. Indeed, that question was not before the court since the plaintiff there relied entirely on an alleged violation of the common law standard of care, which is accepted by Kentucky and maritime law alike.

II

Even Were There No Constitutional Obstacle to Its Application, the Employers' Liability Act Would Not Govern Here

Even if there were no constitutional prohibition against the application of the Oregon Employers' Liability Act in the circumstances of this case, appellant's position would not be improved. By its terms, and as construed by the Oregon Supreme Court, the coverage of the act in no event would extend to the situation at bar.

1. The repair and construction work called for by the contract was entirely under the supervision, control and direction of Larson, the decedent's employer. Larson was not only under a duty to supply all necessary equipment and labor but, additionally, he had the sole voice with respect to "the details, manner, [and] method by which the work under the contract was to be accomplished" (R. 58). For its part the Government possessed the right merely to insure that the

“general result [was] in conformity with the contract’s specifications” (R. 58).

As thus contemplated by the contract, the United States at no time assumed an active role in either the formulation or the execution of the sounding operation which lead to the death of appellant’s decedent. At the outset, it was Larson that decided that soundings should be taken; the contract specifications neither required nor referred to such a course of action in the project area (R. 54). Having made this decision, Larson then determined for himself both how the operation was to be conducted and that it involved no undue risk to the personnel involved (R. 54-55, 58). Specifically, Larson (1) determined that the soundings would be taken in Bay 9 off the side of a barge; (2) concluded that only the gates in Bays 9 and 10 need be closed for this purpose; and (3) dispatched his superintendent on a reconnaissance mission to insure that the operation, as planned, could be safely conducted (R. 54-55). Larson did not seek the Government’s opinion as to the safety of the operation; to the contrary, the construction project engineer’s participation was limited to receiving, and forwarding to the operating personnel of the dam, the Larson request that the gates in Bays 9 and 10 be closed (R. 54-55). That request was honored (R. 54).

Insofar as the execution of the operation was concerned, Larson selected the tug and barge to be utilized (R. 55, 58). He also selected the captain and other members of the tug’s crew, as well as the personnel comprising the sounding party (which was in charge of a civil engineer in Larson’s employ) (R. 55, 58-59). And Larson, or his representative, directed the method by which the tug and barge were to be fastened together

and formulated the route that the unit was to take in reaching the situs of the proposed soundings (R. 55-56, 58).

2. The keystone of the Employers' Liability Act is O.R.S. 654.305, *infra*, p. 36, which provides in relevant part:

Generally, all owners, contractors of subcontractors and other persons *having charge of, or responsible for, any work* involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb * * *. [Emphasis supplied.]

And O.R.S. 654.310, *infra*, p. 36, dealing with the protective measures to be observed regarding dangerous machines, equipment and devices, begins with:

All owners, contractors, subcontractors or persons whatsoever, *engaged* in the construction, repairing, alteration, removal or painting of any building * * *. [Emphasis supplied.]

On its face, then, the statute imposes a special duty only upon those who, unlike the Government here, are actually engaged in the work which subjects the employees to danger, or are in charge of it.

In *Warner v. Synnes*, 114 Or. 451, 230 Pac. 362, 235 Pac. 305, the defendant lumber company had retained the plaintiff's employer, Synnes, as an independent contractor to do repair, alteration and construction work on the lumber company's premises. As is true of the Government here (R. 58), the lumber company did not exercise control over the work of the independent contractor but, rather, was interested only in the result. The

company did, however, furnish certain equipment to Synnes, including a rope which was used by the latter on a scaffold. Injured when the rope broke, the plaintiff brought suit against the lumber company under the Employers' Liability Act; the complaint alleging that the company (1) had failed to provide a safe place to work; (2) had allowed an unsuitable rope to be used in the construction of the scaffold; and (3) had failed to test the material which it had furnished to the contractor.

In reversing a jury verdict in favor of the plaintiff, the Oregon Supreme Court observed [114 Or. at 458]:

It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work. . . . The reason for making the contractor alone responsible and exonerating the owner with whom he contracts is that the owner is not the person in charge of the work and so is not responsible for the injury complained of. [Emphasis supplied.]

The Court added that [114 Or. at 458]:

The mere retention by the owner of the right to inspect as it progressed for the purpose of determining whether it was completed according to plans and specifications does not operate to create the relationship of master and servant between the owner and those engaged on such work.

Cf. *Lawton v. Morgan, Fliedner and Boyce*, 66 Or. 292, 131 Pac. 314, 134 Pac. 1037; *Tamm v. Savset*, 67 Or. 292, 135 Pac. 868.

3. Notwithstanding *Warner v. Synnes, supra*, appellant argues that it is totally irrelevant that the Government was not engaged in, in charge of or responsible for the sounding expedition. His theory seemingly is that it is sufficient that employees of the United States operated the spillway dam and its gates.

A sufficient answer is that this line of argument totally ignores the fact that Larson's control over the manner in which the expedition was to be conducted extended to the matter of the number of dam gates that were to remain open while the soundings were taken (and, therefore, the amount of water which was being discharged). The determination that only the gates in Bays 9 and 10 would be closed was made by Larson on the basis of his superintendent's reconnaissance trip and his own knowledge (not shared by the Government) of the intimate details of the operation and the precise nature of the equipment which was to be utilized. And, appellant himself places considerable emphasis on the evidence that, had Larson requested that an additional gate be closed, that request undoubtedly would have been honored.

Appellant can point to no Oregon decision under the Act in which an owner was held liable to an employee of an independent contractor in circumstances where the contractor possessed anything approaching Larson's degree of responsibility and control over every detail of the sounding operation and the conditions under which it was being carried out. Even a cursory examination of the cases upon which he relies

will reflect their marked difference from the facts of this case.

In both *Rorvik v. Northern Pacific Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163, and *Pacific States Lumber Co. v. Bargar*, 10 F. 2d 335 (C.A. 9), for example, the statute was held applicable because the plaintiff's employer and the defendant were actively engaged in a common pursuit and there was an intermingling of the two sets of employees. Cf. *Drefs v. Holman Transfer Co.*, 130 Or. 452, 280 505. And, in *Walter v. Dock Commission*, 126 Or. 487, 266 Pac. 634, 270 Pac. 778, the accident occurred by reason of an affirmative act of the defendant in the course of its work (*i.e.*, the ejection of the railroad car). This act was done without even the knowledge of any individual engaged in the work being performed by the decedent. Further, decedent's employer was not an independent contractor of the defendant and, unlike Larson, possessed no control whatsoever over the manner in which the railroad equipment was handled. Again, the only affirmative action taken by Government employees which in any way affected appellant's decedent was the closing of those gates which the persons engaged in, responsible for and in charge of the sounding operation deemed necessary for the safety of decedent and the other personnel involved.

4. While it was not necessary for the District Court to reach the question, it is worthy of note that the record does not support appellant's contention that there was a violation by the Government of the standard of care prescribed by the Employers' Liability Act. Appellant asserts (Br. p. 26) that the Act imposed a duty upon the United States either (1) to close additional gates, or (2) to warn Larson as to the alleged

“dangerous condition created by the turbulent waters in the immediate vicinity of [Bay 9]”. But, as the court below found “[t]he turbulent condition of the water in the spillway basin was open, apparent and obvious to all, including the independent contractor, the operator of the tug boat and the other employees of the independent contractor” (R. 57). The court additionally found that “[t]he difference in the elevation of the water in the turbulent area opposite the open gates, as compared with the area opposite the closed gates in the spillway basin was also visible and obvious” (R. 57).

In view of these findings, coupled with the trip made by the Larson superintendent for the sole purpose of determining whether the soundings could be taken safely, no duty to warn could possibly have arisen, under the Act or otherwise (cf. p. 32, *infra*). Larson’s information as to the turbulent nature of the waters, and the significance thereof in terms of the safe conduct of the sounding operation, was superior to that of the Government.

III

The District Court’s Finding that There Was No Negligence on the Part of Government Employees Is Not “Clearly Erroneous”

The District Court’s conclusion that appellant had not established liability under the Oregon Wrongful Death Act was grounded upon its ultimate finding that “[n]either the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing the death of [appellant’s decedent]” (R. 59). Challenging this critical finding, appellant insists that whether the Government was negligent or not is a question of law, and not of fact.

But, as this Court observed in the very case upon which appellant relies in making this assertion [*United States v. Marshall*, 230 F. 2d 183, 187]:

Negligence is ordinarily a question of fact to be resolved by the trier of fact (citing cases). It is only where the facts are undisputed *and* where but one reasonable conclusion can be drawn therefrom that negligence becomes a question of law (citing cases). If the finding of [no] negligence is supported by substantial evidence considered in the light most favorable to the prevailing party, then it should be sustained. [Emphasis in original.]

Cf. *Brady v. Oregon Lumber Co.*, 117 Or. 188, 243, Pac. 96; *Allison v. Davidson*, 173 Or. 244, 141 P. 2d 530; *Jackson v. Sumter Valley Ry. Co.*, 50 Or. 455, 93 Pac. 356.¹¹

Measured by this standard, which is in essence the “clearly erroneous” test provided by Rule 52(a) of the Federal Rules of Civil Procedure, the findings below are invulnerable to attack. The record reflects that, if there was negligence at all, it was on the part of Larson—who (1) had total direction of the work in which appellant was engaged (including the manner in which, and the conditions under which, it was to be performed); and (2) had made the decision that the dictates of safety required the closing of no further gates.

That the United States cannot be held for the negligence, if any, of Larson is not open to question. Apart from the general rule that an employer is not responsi-

¹¹ The cited Oregon cases are to the same effect. In any event, as this Court very recently re-emphasized, the federal courts are not bound by the scope of review pertaining in state courts. *Grenier v. Harley*, 250 F. 2d 539, 542.

ble for the negligence of its independent contractors,¹² the Congressional definition of "employee of the Government" for the purposes of Section 1346(b) expressly excludes officers, employees or persons acting on behalf of contractors with the United States. Cf. *United States v. Hull*, 195 F. 2d 64, 66 (C.A. 1); *Strangi v. United States*, 211 F. 2d 305 (C.A. 5); *State of Maryland for Use of Pumphrey v. Manor Real Estate and Trust Co.*, 176 F. 2d 414 (C.A. 4).¹³

¹²*Restatement of the Law of Agency*, § 250.

¹³As part of its general discussion of the waiver of the Government's immunity from suit in tort, the First Circuit observed in *United States v. Hull*, *supra*, 195 F. 2d at 67:

[T]here are certain cases where under local law a private person may be liable for injuries resulting from the negligence of a carefully selected independent contractor. Restatement of Torts § 416 *et seq.* Presumably the United States would not be subject to liability in such a case under the Federal Tort Claims Act, for it may well be that the negligent independent contractor would not be deemed an "employee" of the government within the meaning of Section 1346(b).

In Oregon an employer is liable for the negligence of an independent contractor only in circumstances where the work being performed is necessarily attended with danger, however skillfully performed. If the work to be performed by the independent contractor may be safely done in the exercise of reasonable care (though in the absence of such care injurious consequences may result) then the contractor alone is liable. *Persons v. Raven*, 187 Or. 1, 207 P. 2d 1051; *Winneford v. MacLoad*, 68 Or. 301, 136 Pac. 25; *Dibert v. Gubisch*, 74 Or. 64, 144 Pac. 1184; *Oregon Fisheries Co. v. Elmore Packing Co.*, 69 Or. 340, 138 Pac. 862. Since, in the *Dibert* and *Winneford* cases, the court held that blasting operations utilizing high explosives were *not* "necessarily attended with danger" so as to render the employer of the contractor liable, appellant cannot be heard to assert that this case comes within the narrow exception to the general rule of non-liability.

That the admiralty law does not impose liability upon an employer of an independent contractor for the latter's negligence is also clear. See *e.g.*, *Bettis v. Frederick Leyland & Co.*, 153 Fed. 571 (C.A. 5); *Navigazione Alta Italia v. Vale*, 221 Fed. 413 (C.A. 5); *The Clan Graham*, 163 Fed. 961 (D. Ore.).

Appellant's reliance on Section 343 of the *Restatement of the Law of Torts*, for the proposition that the United States was under a common law duty to close additional spillway gates in the area of Bay 9, or to warn Larson of the dangers allegedly inherent in the turbulent condition of the water, is difficult to understand. That Section (which, as appellant correctly observes, represents Oregon law) provides that "[a] possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereof *if*, but only *if*, he * * * (b) has no reason to believe that they will discover the condition or realize the risk involved therein" [Emphasis supplied]. It cannot possibly be said that the Government had no reason to believe that Larson and his employees would discover the turbulent condition of the water when, as the court below found, that condition was "open, apparent, and obvious to all." And, in view of the reconnaissance trip undertaken by Larson's superintendent—in the very area in which the accident occurred and under similar conditions—appellant cannot seriously contend that the Government knew, or should have known, that Larson and his employees did not fully appreciate any dangers that may have been involved in the carrying out of the sounding operation. Surely, as implicitly recognized by the court below, the Government had every right to assume that the Larson superintendent was capable of ascertaining the degree of safety of the scheme conceived by Larson for the taking of soundings by his own employees. After all, his reconnaissance trip was made for that very purpose.

In these circumstances, we find it equally difficult to comprehend appellant's reliance upon *Dye v. United States*, 210 F. 2d 123 (C.A. 6). In that case, the evidence

reflected that the condition which occasioned the accident was difficult, if not impossible, to perceive at any distance, and that, as to the operators of small craft in the vicinity of the dam, it represented a latent hazard. Referring to the testimony adduced at trial, the Sixth Circuit pointed out that "the public never knows when it [the dam] is open or closed" (210 F. 2d at 127), and "at a point from 1000 to 2500 feet away from the dam, a person could not tell when the wickets were open by seeing merely the one sign on the Pennsylvania Railroad bridge" (*id.* at 127).

Nor is there anything in appellant's quotation from *Hicks v. Peninsula Lumber Co.*, 109 Or. 305, 220 Pac. 133, which detracts from the propriety of the findings below. In actuality, the *Hicks* case serves to bring into still sharper focus the lack of merit to appellant's attack upon them.

There, the plaintiff's employer, an independent contractor, had been retained to install a so-called mud-drum beneath boilers in the defendant's factory. The contract required the defendant, before the work commenced, to disconnect the pipe leading from the mud-drum to a "blow-off" tank located outside the building. The purpose of this requirement was to insure that live steam emitted from the tank did not back up the pipe into the mud-drum while the work was in progress.

The defendant disconnected the pipe. Subsequently, however, it was reconnected by the defendant without the knowledge of the plaintiff or any other employee of the contractor. Still later, while the plaintiff was working inside the drum, an employee of the defendant, without ascertaining whether the valves in the reconnected pipe were close, caused live steam to be ejected from a boiler. This steam passed through the "blow-

off" tank and backed up into the pipe leading to the mud-drum. Because the valves were open, the steam eventually reached the mud-drum and seriously scalded the plaintiff.

On these facts, the Oregon court held that the question of the defendant's negligence was for the trier of fact. In view of that holding, appellant cannot assert that the finding of the court below was "clearly erroneous"; *i.e.*, that the Government was negligent as a matter of law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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MARCH, 1958.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2671.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

“Federal agency” includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

“Employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States,

and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The Oregon Employers' Liability Act provides as follows :

654.305 *Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or oper-

ation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to

come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for

their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

15688

No. 15689

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDDIE RENA HAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

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Southern District of California, Central Division.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of Counts Three and Four of a five-count indictment which named Edward Burton as a co-defendant [T. 19].¹ Count Three charged appellant with the sale and facilitation of sale of approximately 283 grains of heroin on or about September 11, 1956, and Count Four charged appellant with the sale and facilitation of sale of approximately 223 grains of heroin on or about September 26, 1956 [T. 3, 4]. Both

¹The abbreviation "T" refers to the Clerk's "Transcript of Record."

of said counts are charged to be offenses in violation of Title 21, United States Code, Section 174.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

Counts One and Two of said indictment were dismissed by appellee at the outset of trial [T. 7], and appellant was found not guilty of Count Five by the jury [T. 5].

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231. This court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

On September 11, 1956, Deputy Sheriff William R. Farrington, in the presence of other narcotics officers, made a phone call to Edward Burton, at the latter's home, and made arrangements to purchase one ounce of heroin from Burton at France's Drive-In in Los Angeles at 7:00 P.M. [R. 124, 125].² Farrington had had prior dealings with Burton whereby he had been able to purchase narcotics from him [R. 332]. Pursuant to the phone call Farrington, after apprising the other officers of the arrangements, met Burton at the drive-in at 7:10 P.M. Under the surveillance of Deputy Sheriff Algy F. Landry and Federal Agent Malcolm P. Richards [R.

²The abbreviation "R" refers to the "Reporter's Transcript of Proceedings."

178, 179, 250], Burton entered Farrington's car, received \$300 from the latter, and stated that he would return in about twenty minutes. Burton then left the area by car and was followed by Landry and another officer to appellant's home at 5226 West 20th Street, Los Angeles. Richards remained with Farrington at the drive-in. At appellant's home Burton inquired of appellant whether she could obtain an ounce of heroin. Appellant stated that she could, made a phone call, and left with Burton in appellant's car [R. 70]. Landry followed them but lost appellant's car in traffic. Appellant drove to Adams Boulevard, temporarily dropped Burton off, picked him up again, and then proceeded further down Adams Boulevard where she alighted from the car and picked up a package [R. 70-72]. During this time, Burton turned over part of the money received from Farrington to appellant [R. 73, 74].³ Appellant then drove back to her home where she and Burton separated. Burton returned to France's Drive-In at about 8:55 P.M. and, again under the surveillance of officers, gave the package which appellant had picked up to Farrington [R. 73]. Said package consisted of a glassine bag containing 283 grains of heroin which the officers immediately marked for identification [R. 126, 195, 197].

Farrington again contacted Burton by telephone on September 24, 1956 and arranged to meet him at a

³Page 74, line 1, of Reporter's Transcript of Proceedings should read "Hamer" in lieu of "him". See Reporter's correcting affidavit in Appendix.

Thrifty Drug Store in the Venice area to consummate another purchase of heroin [R. 127]. Burton arrived at about 11:35 A.M. and advised Farrington to follow him to the former's home. Farrington complied, and under the surveillance of following officers, went to Burton's home at 1669 Indiana Street in Venice [R. 127, 183]. In the house, Farrington stated that he wanted an ounce of heroin whereupon Burton made a phone call to appellant saying "Hello Eddie, I want one" and inquiring if she "could get it" [R. 75, 128, 169]. Appellant informed Burton that she didn't know but would try [R. 75]. Burton then informed Farrington to meet him at the aforementioned drive-in at 2:30 P.M. and Farrington thereupon gave Burton \$300 in cash which had been previously dusted with a fluorescent powder and whose serial numbers the narcotic officers had previously recorded. Farrington left, rejoining the surveilling officers, and after advising them of the situation, proceeded to the drive-in with two of the officers while Richards and Deputy Sheriff Arthur Gillette remained in the vicinity of Burton's home. Burton was observed by Richards to leave his house at about 1:30 P.M. and was followed by the latter to appellant's home. Appellant was present therein and after informing Burton that she would try to locate the "fellow" made a phone call but "couldn't get in touch with him" [R. 75, 76]. Burton left at about 2:30 P.M. and, under Richard's surveillance, proceeded to the drive-in where he informed Farrington that it would be about twenty minutes. Burton then returned to appellant's home, under the surveillance of Richards and Landry. At about 3:00 P.M. Burton, accompanied by appellant and Loretta Rainey, were observed by the officers to leave appellant's home and drive off in Burton's

car. Richards followed them and observed appellant leave the car on South Avalon Boulevard and engage a man in conversation. At 43rd Street and Central Avenue, appellant again briefly left and upon her return informed Burton that she still couldn't find "him" [R. 77]. The group then continued to 42nd Place where Richard observed appellant enter her aunt's house at 856 E. 42nd Place.

Upon returning in 10 minutes appellant advised Burton that she would "give him about 30 minutes" and "we will go over on 35th and Normandie" [R. 79]. In proceeding to said location, Burton stopped and went into an auto spare parts shop on Adair and St. Pedro Streets. There is no evidence in the record supporting appellant's statement on page 9 of her opening brief that Burton had a package when returning to the car [R. 291, 316, 413]. At 35th Street and Normandie Avenue appellant was observed by Burton (Richards in the interim having lost Burton's car while attempting to follow from the auto shop) to go to the corner and return with a package [R. 80]. After another stop at Rainey's house the group proceeded to appellant's home whereupon Burton left for the drive-in. In the meantime, he had given appellant some of the marked money received from Farrington [R. 82]. Arriving at the drive-in at about 5:15 P.M., Burton gave Farrington the package which appellant had picked up at 35th Street and Normandie Avenue [R. 80, 81], and was placed under arrest by Farrington, Landry, and the other surveilling officers. Said package consisted of a glassine bag containing 222 grains of heroin which was marked for identification by the officers [R. 129, 198, 199]. They found \$35.00 of the marked money on Burton's person and he at that time

confirmed to Farrington, Landry, Richards, and the other officers that he had given the balance of the marked money to appellant and that the narcotics previously delivered to Farrington had, on each occasion, been obtained from appellant [R. 331, 335, 336]. Officer Landry, accompanied by other officers, proceeded to appellant's home and arrived at 5:40 P.M. just as appellant and Rainey were leaving the house. As appellant and Rainey were coming down the private walk of the premises which led to the street, and before they reached the public sidewalk, the officers stopped them [R. 334, 335, 214]. Landry exhibited his credentials to appellant, advised her that she was under arrest for violation of the federal narcotic laws, and informed her of constitutional rights [R. 214, 215]. Rainey was not placed under arrest [R. 216]. Upon being informed of her arrest, appellant told the officers to come into her house because she didn't "want the neighbors to know anything." [R. 185, 399]. Appellant then opened her front door, which was apparently locked, and entered her home followed by the officers [R. 185]. Thereupon appellant drew the window blinds and, in response to Landry's query whether she had any money on her person, stated that she did, and emptied the contents of her purse on a table. Among the contents the officers found \$30.00 of the fluorescently dusted money, which a check of the serial numbers disclosed had been previously given to Burton by Farrington. Appellant's fingertips were similarly found to be fluorescent [R. 132].

After a search of the house (which is not material to the instant appeal) appellant was taken to the Federal Building in Los Angeles where, after again being advised of her constitutional rights, appellant told the officers that on September 24 she had phoned one "Roadbuddy" (later identified by appellant as William McHenry) from her aunt's home and arranged a meeting place; that she thereafter met said individual and purchased an ounce of heroin from him; and that she gave him \$250 therefore but that he returned \$30.00 of said sum to her [R. 206-207, 272-276].

Statutes Involved.

So far as pertinent to this appeal, Counts Three and Four were brought under Title 21, United States Code, Section 174 which in pertinent part provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

Appellant Was Not Deprived of a Trial by an Impartial Jury.

- (1) In Non-capital Offenses There Is No Constitutional Right to Advance Information About the Jury.

The basic rule relative to the selection of juries in the Federal system was expressed by the United States Supreme Court in *Pointer v. United States*, 151 U. S. 396, 39 L. Ed. 214 as follows, on pages 407, 408:

“But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States v. Shackelford*, 18 How. 588; *United States v. Richardson*, 28 Fed. Rep. 61, 69. In the absence of such a rule or order, (and no such rule or order appears to have been made by the court below,) the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses.”

The sole Congressional restriction applicable to advance service of jury lists is contained in Title 18, United States Code, Section 3432 wherein provision is made for such advance service in treason and other capital offenses.

Since its inception this statute has been uniformly construed to have no application to non-capital offenses.

United States v. Williams, Fed. Cas. No. 16709, 28 Fed. Cas. 646 (1804);

United States v. Van Duzee, 140 U. S. 169, 35 L. Ed. 399 (1890);

Shelp v. United States, 81 Fed. 694 (C. C. A. 9th, 1897);

Brown v. Johnson, 126 F. 2d 727 (C. C. A. 9th, 1942), cert. den. 63 S. Ct. 39, 317 U. S. 627.

Appellant admits that at common law foreknowledge of the jury was limited to capital offenses (Appl. Op. B. 45, 47)⁴ and that there is no constitutional right to such foreknowledge (Appl. Op. B. 49). The courts are in accord (see *United States v. Van Duzee*, *supra*).

Accordingly, in non-capital offenses, "the jury list can't be required and need not be furnished in advance of trial" (*Hendrickson v. United States*, 249 Fed. 34 (C. C. A. 4th, 1918), at p. 35); and it has been held, in accordance with the above quoted principle of *Pointer v. United States*, *supra*, that the District Court has the discretionary power in non-capital cases to promulgate an order forbidding the court clerk to reveal the jury list in advance of trial to anyone but the Marshal.

Wilson v. United States, 104 F. 2d 81 (C. C. A. 5th, 1939), cert. den. 60 S. Ct. 89, 308 U. S. 574;

See:

Spivey v. United States, 100 F. 2d 181 (C. C. A. 5th, 1940), cert. den. 60 S. Ct. 1079, 310 U. S. 631.

⁴The abbreviation "Appl. Op. B." refers to Appellant's Opening Brief.

(2) The Action of the Trial Court in Denying Appellant's Request to Personally Voir Dire the Jury Did Not Deny to Appellant Any Constitutional Rights.

The trial court made its own examination of the prospective jurors, advising them of their duties as jurors, and questioning them for possible prejudice [R. 6-15]. Although the court did not allow appellant's counsel to personally *voir dire* the jury [R. 16], the court did propound to the jury all inquiries requested by appellant [R. 16-18, 22]. At all times the court was solicitous in behalf of appellant in determining whether it had put to the jury all questions desired by her counsel [R. 18, 20, 22, 24, 32-35]. Appellant now complains that this procedure violated her constitutional rights.

This contention has been consistently held to be without merit (*Ungerleider v. United States*, 5 F. 2d 604 (C. C. A. 4th, 1925), cert. den. 269 U. S. 574; *Murphy v. United States*, 7 F. 2d 85 (C. C. A. 1st, 1925), cert. den. 46 S. Ct. 120, 269 U. S. 584; *Kurczak v. United States*, 14 F. 2d 109 (C. C. A. 6th, 1926); *Paschen v. United States*, 70 F. 2d 491 (C. C. A. 7th, 1934); *Seadlund v. United States*, 97 F. 2d 742 (C. C. A. 7th, 1938)), the courts stating that the manner in which the examination of prospective jurors is conducted rests in the discretion of the trial court.

Speak v. United States, 161 F. 2d 562 (C. C. A. 10th, 1947);

Murphy v. United States, *supra*.

Also see following 9th Circuit Cases:

Bradshaw v. United States, 15 F. 2d 970 (C. C. A. 9th, 1926);

Bonness v. United States, 20 F. 2d 754 (C. C. A. 9th, 1927);

Frederick v. United States, 163 F. 2d 536 (C. C. A. 9th, 1947), cert. den. 68 S. Ct. 87, 332 U. S. 772.

The procedure followed by the trial court herein is not only sanctioned by the appellate courts (see cases cited *supra*), but is expressly provided for by Rule 24(a) of the Federal Rules of Criminal Procedure.

(3) The Government's Possession of a Loose-leaf Book Containing the Names of Past Jurors in Other Cases Did Not Deprive Appellant of a Fair Trial by an Impartial Jury.

During the time that peremptory challenges were being exercised, appellant's counsel approached the bench and stated to the trial court that counsel for the Government had a loose-leaf book which he referred to in his challenging of the jury [R. 27]. After some discussion concerning same, the challenges were concluded, and thereafter appellant's counsel suggested that the trial court examine said book *in camera* [R. 47]. Said examination was made by the court whereupon the court found that the information contained therein consisted merely of impressions of a jury gained by a particular Assistant United States Attorney in court after trial of a case; that it did not consist of an advance jury list; and that nothing contained therein showed any impropriety or unfair acquirement of knowledge which in any way impaired the fair impaneling of the jury in this case [R. 277-284].

Appellant now contends, without citation of any authority in support thereof, that the Government's possession of said book created a situation of inequality which deprived appellant of a fair trial by an impartial jury.

In *Christoffel v. United States*, 171 F. 2d 1004 (C. C. A. D. C., 1948), a similar contention was made. There, defendant's counsel advised the court that the Government's counsel had additional information before him with reference to the jurors, and moved the court for a copy thereof on the grounds that he was entitled to the benefit of the same information. Counsel also moved the court to have the jury panel disqualified. In upholding the trial court's denial of said motions the appellate court stated at page 1006:

"There is no merit in the contention that the court should have disqualified the panel or should have allowed appellant's counsel to examine the government's notes, if any, concerning it. There is no evidence, and counsel did not attempt to introduce any, that the government made any investigation, to say nothing of an improper one, of prospective jurors. Counsel's suggestion of what he thought probable is not evidence. The Sinclair case [*Sinclair v. United States*], 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258, involved offensive shadowing of jurors during a trial and is plainly not in point. And the government is not required to furnish the defense with notes it may have made for use in selecting a jury."

Also see:

Best v. United States, 184 F. 2d 131 (C. C. A. 1st, 1950), cert. den. 340 U. S. 939, rehear. den. 341 U. S. 907.

In the case at bar, as pointed out by the trial court, there is also no evidence, aside from counsel's suggestion of what he thought probable, that any improper investigation of prospective jurors was made or that the jury was not impartial. On the contrary, the impartiality of the jury is evidenced by their acquittal of appellant on Count Five of the indictment [T. 5].

The adequate interrogation of prospective jurors by the trial court, in aid of appellant's exercise of challenge [R. 6-18], together with appellant's failure to utilize all available challenges, and her acceptance of the jury [R. 34], further points out the fairness of the impaneling of the jury.

II.

Appellant's Arrest and Subsequent Search Did Not Violate Her Constitutional Rights.

(1) The Search of Appellant's Person Was a Lawful Incidence of Her Legal Arrest.

Appellant admits that the search in issue is valid if incident to a lawful arrest (Appl. Op. B. 64). She further admits that, by virtue of Title 26, United States Code, Section 7607, the arrest is lawful if the arresting officer had reasonable grounds to believe that appellant had committed the offense (Appl. Op. B. 65).

The fundamental concept that the existence of probable cause is tested on the basis of information received by the arresting officers from others, as well as their own personal observations, is also not denied (Appl. Op. B. 66); and see *Brinegar v. United States*, 338 U. S. 160 (1949); *Carrol v. United States*, 267 U. S. 132 (1925); *Gilliam v. United States*, 189 F. 2d 321 (C. C. A. 6th, 1951); *United States v. Li Fat Tong*, 152 F. 2d 650 (C. C. A. 2nd, 1945).

It is submitted that in the instant case, the observations of the arresting officers, together with the information imparted to them by Burton, meets the standards of probable cause necessary to justify an arrest. Appellant apparently does not quarrel with this conclusion, but asserts that the information received from Burton must be discounted as not being reasonably trustworthy. However, this is not a case in which the officers received an uncorroborated tip from an informer whose very identity was unknown; nor do the facts present herein justify the conclusion that the arrest was based solely on mere suspicion. Appellant's citation of authority in support of these principles is therefore inapplicable.

Officer Farrington had previously dealt with Burton; and the information that the latter gave to the officers so clearly fit in with and verified their own personal observations that it constituted reasonably trustworthy information. For example, the officers' own knowledge of Burton's phone call to an "Eddie" for narcotics, and his immediate meetings with appellant Eddie Hamer after arranging narcotic sales to Farrington, were sufficient to warrant a reasonable man giving credence to Burton's admission that appellant was his source of narcotic supply. See:

United States v. Volkell, 251 F. 2d 333 (C. C. A. 2nd, 1958);

Browner v. United States, 215 F. 2d 753 (C. C. A. 6th, 1954).

With regard to appellant's contentions that the arrest was a mere pretext for the search of her home and that she did not consent to the searches conducted therein, suffice it to say that all the evidence, including appellant's

own testimony [R. 399], clearly establishes that the arrest was consummated on the exterior premises of her home, and that the officers entered therein only at appellant's own insistence; that she told the officers to search her home before any search commenced [R. 342-343]; and that she voluntarily emptied the contents of her purse in response to Landry's query whether she had any money on her person.

III.

The Balance of Appellant's Assignments of Error Are Without Merit and Did Not Prejudice Her.

It is submitted that the balance of appellant's contentions raise no issue of merit or substance, and appellee therefore summarily answers them as follows:

(1) The contention of judicial misconduct is refuted by an examination of the record itself. Such an examination, it is submitted, would reveal that appellant's counsel invited the action of the trial court in enforcing its duty to preside over a fair and orderly trial. Accordingly, appellant cannot be heard to complain thereof. With reference to the trial court's conduct regarding the witness Burton, the court in *Tucker v. United States*, 5 F. 2d 818 (C. C. A. 8th, 1925), cited by appellant in support of her contention of misconduct (Appl. Op. B. 62), stated on page 824, relative to the Fifth Amendment, as follows:

“There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution.”

Also see: *Gruher v. United States*, 255 Fed. 474 (C. C. A. 2nd, 1918), wherein the court commented on page 477:

“ . . . it is always the duty of a trial court to assist or direct a witness who is stumbling over a technical point. It cannot be error to ask a witness who declines to answer without his counsel being present whether he means to claim his privilege.”

(2) In an attempt to bring this case within the rule of *McNabb v. United States*, 318 U. S. 332, appellant states that she was afforded no opportunity to phone her attorney or husband and that she was coerced into making her confession (Appl. Op. B. 80). Nothing in the record, aside from appellant's own self serving testimony, sustains such conclusions [R. 233, 293, 326, 327]. Nor does the record reveal any lengthy or illegal detention of appellant prior to arraignment. The record, does however, show that at the time of arrest and again at the time of interrogation appellant was advised of her right to have an attorney [R. 215, 207], and was advised to contact one [R. 148].

As this court stated in *Haines v. United States*, 188 F. 2d 546 (C. C. A. 9th, 1951), cert. den. 342 U. S. 888, at pages 552 and 553:

“In the *McNabb* case, *supra*, 318 U. S. at page 346, 63 S. Ct. at page 615, the Court said that the mere fact that one makes a confession while in the custody of the police does not render the confession inadmissible. . . .

“Incidents of the oppressive nature shown in the *McNabb* case are wholly absent in the instant case and its facts do not even faintly resemble the *McNabb* situation. . . .

“The testimony in the case at bar fails to provide even an inference that an ‘illegal detention’ was deliberately resorted to as a *means*, or for the *purpose* of, extorting a confession or that the confession in this case were *due* to failure promptly to take appellant before a committing magistrate. . . .

“The facts in this case clearly show that appellant made a voluntary oral confession (complete in its details) immediately after he arrived at Eliason’s office on the morning of his arrest. . . .

“In the face of these impressive and convincing circumstances we are unable to conclude that we *must* hold, as a matter of law, that the *bare failure* to have appellant *immediately* arraigned after his arrest on March 3rd automatically translated the short questioning period which immediately followed his arrest into an ‘illegal detention’ the effect of which was to invalidate the oral confession then made. . . .”

The above cited opinion of the *Haines* decision applies with equal force to the instant case.

(3) The record does not sustain appellant’s contention that her counsel was prohibited from asking questions regarding the police report. Rather it shows that counsel elected not to pursue any inquiry thereon when advised by the court that the report could go into evidence if the subject were opened up [R. 240]. Having so elected, any claim of error was waived.

(4) Examination of the record amply justifies the conclusion that, as a matter of law, the evidence was sufficient to sustain appellant’s conviction.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted

LAUGHLIN E. WATERS,
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LLOYD F. DUNN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

EUGENE N. SHERMAN,
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Attorneys for Appellee, United States of America.*

APPENDIX.

State of California, County of Los Angeles—ss.

I, the undersigned, hereby certify that:

Line 1, page 74 of the reporter's transcript in the matter of United States of America v. Edward Burton and Eddie Rena Hamer, No. 25,885, which reads:

"A. I gave part of it to him."

should read:

"A. I gave part of it to Hamer."

This correction is made pursuant to inquiry by United States Attorney as to the word "him," and it was found that my reporter's notes showed the word to be "Hamer."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 15th day of April, 1958.

/s/ DON P. CRAM

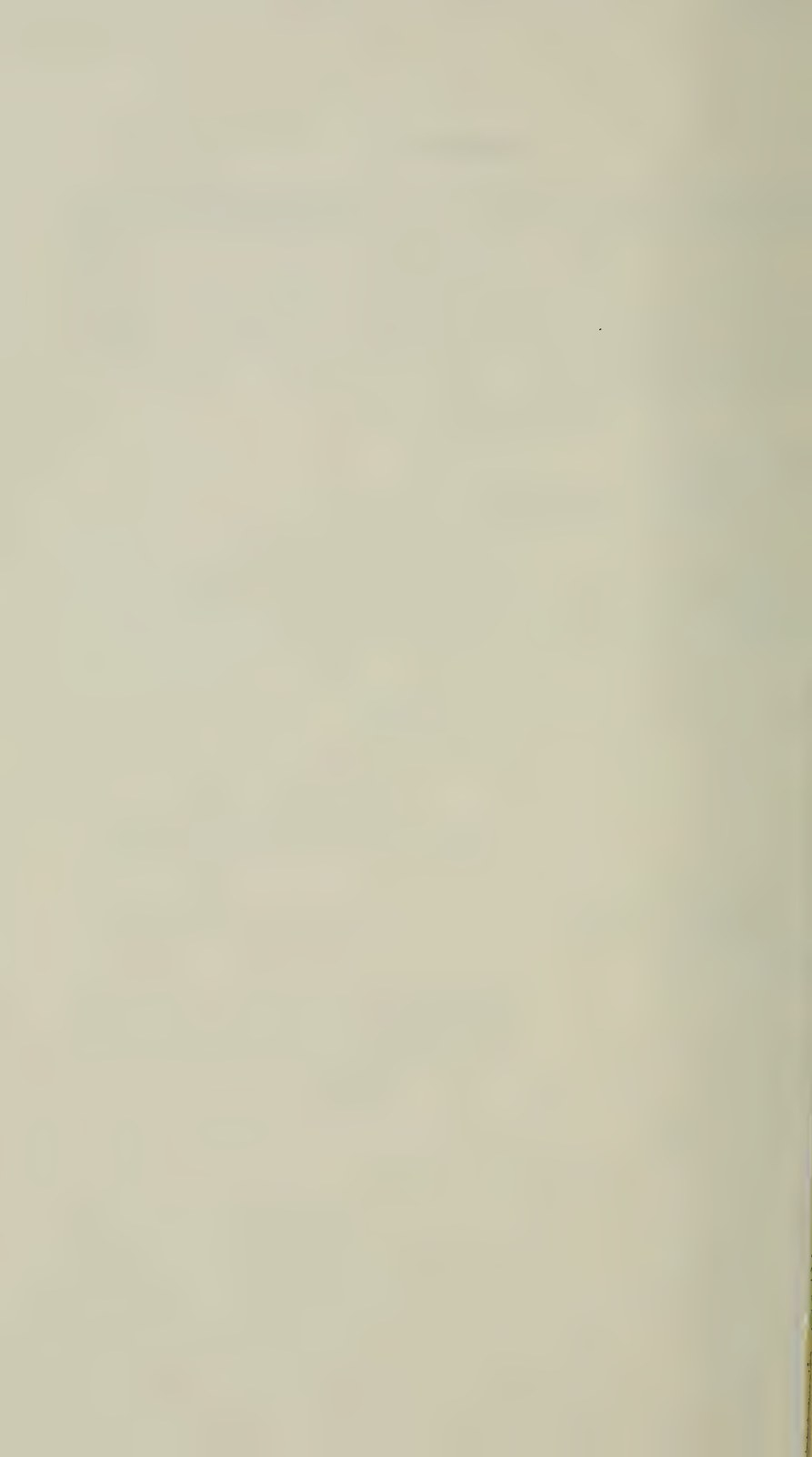
Official Reporter

United States District Court

Subscribed and sworn to before me this 15th day of April, 1958.

MARIE G. ZELLNER

*Notary Public in and for the State
of California.*



15688

No. 15689-

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDDIE RENA HAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
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APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of Counts Three and Four of a five-count indictment which named Edward Burton as a co-defendant [T. 19].¹ Count Three charged appellant with the sale and facilitation of sale of approximately 283 grains of heroin on or about September 11, 1956, and Count Four charged appellant with the sale and facilitation of sale of approximately 223 grains of heroin on or about September 26, 1956 [T. 3, 4]. Both

¹The abbreviation "T" refers to the Clerk's "Transcript of Record."

of said counts are charged to be offenses in violation of Title 21, United States Code, Section 174.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

Counts One and Two of said indictment were dismissed by appellee at the outset of trial [T. 7], and appellant was found not guilty of Count Five by the jury [T. 5].

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231. This court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

On September 11, 1956, Deputy Sheriff William R. Farrington, in the presence of other narcotics officers, made a phone call to Edward Burton, at the latter's home, and made arrangements to purchase one ounce of heroin from Burton at France's Drive-In in Los Angeles at 7:00 P.M. [R. 124, 125].² Farrington had had prior dealings with Burton whereby he had been able to purchase narcotics from him [R. 332]. Pursuant to the phone call Farrington, after apprising the other officers of the arrangements, met Burton at the drive-in at 7:10 P.M. Under the surveillance of Deputy Sheriff Algy F. Landry and Federal Agent Malcolm P. Richards [R.

²The abbreviation "R" refers to the "Reporter's Transcript of Proceedings."

178, 179, 250], Burton entered Farrington's car, received \$300 from the latter, and stated that he would return in about twenty minutes. Burton then left the area by car and was followed by Landry and another officer to appellant's home at 5226 West 20th Street, Los Angeles. Richards remained with Farrington at the drive-in. At appellant's home Burton inquired of appellant whether she could obtain an ounce of heroin. Appellant stated that she could, made a phone call, and left with Burton in appellant's car [R. 70]. Landry followed them but lost appellant's car in traffic. Appellant drove to Adams Boulevard, temporarily dropped Burton off, picked him up again, and then proceeded further down Adams Boulevard where she alighted from the car and picked up a package [R. 70-72]. During this time, Burton turned over part of the money received from Farrington to appellant [R. 73, 74].³ Appellant then drove back to her home where she and Burton separated. Burton returned to France's Drive-In at about 8:55 P.M. and, again under the surveillance of officers, gave the package which appellant had picked up to Farrington [R. 73]. Said package consisted of a glassine bag containing 283 grains of heroin which the officers immediately marked for identification [R. 126, 195, 197].

Farrington again contacted Burton by telephone on September 24, 1956 and arranged to meet him at a

³Page 74, line 1, of Reporter's Transcript of Proceedings should read "Hamer" in lieu of "him". See Reporter's correcting affidavit in Appendix.

Thrifty Drug Store in the Venice area to consummate another purchase of heroin [R. 127]. Burton arrived at about 11:35 A.M. and advised Farrington to follow him to the former's home. Farrington complied, and under the surveillance of following officers, went to Burton's home at 1669 Indiana Street in Venice [R. 127, 183]. In the house, Farrington stated that he wanted an ounce of heroin whereupon Burton made a phone call to appellant saying "Hello Eddie, I want one" and inquiring if she "could get it" [R. 75, 128, 169]. Appellant informed Burton that she didn't know but would try [R. 75]. Burton then informed Farrington to meet him at the aforementioned drive-in at 2:30 P.M. and Farrington thereupon gave Burton \$300 in cash which had been previously dusted with a fluorescent powder and whose serial numbers the narcotic officers had previously recorded. Farrington left, rejoining the surveilling officers, and after advising them of the situation, proceeded to the drive-in with two of the officers while Richards and Deputy Sheriff Arthur Gillette remained in the vicinity of Burton's home. Burton was observed by Richards to leave his house at about 1:30 P.M. and was followed by the latter to appellant's home. Appellant was present therein and after informing Burton that she would try to locate the "fellow" made a phone call but "couldn't get in touch with him" [R. 75, 76]. Burton left at about 2:30 P.M. and, under Richard's surveillance, proceeded to the drive-in where he informed Farrington that it would be about twenty minutes. Burton then returned to appellant's home, under the surveillance of Richards and Landry. At about 3:00 P.M. Burton, accompanied by appellant and Loretta Rainey, were observed by the officers to leave appellant's home and drive off in Burton's

car. Richards followed them and observed appellant leave the car on South Avalon Boulevard and engage a man in conversation. At 43rd Street and Central Avenue, appellant again briefly left and upon her return informed Burton that she still couldn't find "him" [R. 77]. The group then continued to 42nd Place where Richard observed appellant enter her aunt's house at 856 E. 42nd Place.

Upon returning in 10 minutes appellant advised Burton that she would "give him about 30 minutes" and "we will go over on 35th and Normandie" [R. 79]. In proceeding to said location, Burton stopped and went into an auto spare parts shop on Adair and St. Pedro Streets. There is no evidence in the record supporting appellant's statement on page 9 of her opening brief that Burton had a package when returning to the car [R. 291, 316, 413]. At 35th Street and Normandie Avenue appellant was observed by Burton (Richards in the interim having lost Burton's car while attempting to follow from the auto shop) to go to the corner and return with a package [R. 80]. After another stop at Rainey's house the group proceeded to appellant's home whereupon Burton left for the drive-in. In the meantime, he had given appellant some of the marked money received from Farrington [R. 82]. Arriving at the drive-in at about 5:15 P.M., Burton gave Farrington the package which appellant had picked up at 35th Street and Normandie Avenue [R. 80, 81], and was placed under arrest by Farrington, Landry, and the other surveilling officers. Said package consisted of a glassine bag containing 222 grains of heroin which was marked for identification by the officers [R. 129, 198, 199]. They found \$35.00 of the marked money on Burton's person and he at that time

confirmed to Farrington, Landry, Richards, and the other officers that he had given the balance of the marked money to appellant and that the narcotics previously delivered to Farrington had, on each occasion, been obtained from appellant [R. 331, 335, 336]. Officer Landry, accompanied by other officers, proceeded to appellant's home and arrived at 5:40 P.M. just as appellant and Rainey were leaving the house. As appellant and Rainey were coming down the private walk of the premises which led to the street, and before they reached the public sidewalk, the officers stopped them [R. 334, 335, 214]. Landry exhibited his credentials to appellant, advised her that she was under arrest for violation of the federal narcotic laws, and informed her of constitutional rights [R. 214, 215]. Rainey was not placed under arrest [R. 216]. Upon being informed of her arrest, appellant told the officers to come into her house because she didn't "want the neighbors to know anything." [R. 185, 399]. Appellant then opened her front door, which was apparently locked, and entered her home followed by the officers [R. 185]. Thereupon appellant drew the window blinds and, in response to Landry's query whether she had any money on her person, stated that she did, and emptied the contents of her purse on a table. Among the contents the officers found \$30.00 of the fluorescently dusted money, which a check of the serial numbers disclosed had been previously given to Burton by Farrington. Appellant's fingertips were similarly found to be fluorescent [R. 132].

After a search of the house (which is not material to the instant appeal) appellant was taken to the Federal Building in Los Angeles where, after again being advised of her constitutional rights, appellant told the officers that on September 24 she had phoned one "Roadbuddy" (later identified by appellant as William McHenry) from her aunt's home and arranged a meeting place; that she thereafter met said individual and purchased an ounce of heroin from him; and that she gave him \$250 therefore but that he returned \$30.00 of said sum to her [R. 206-207, 272-276].

Statutes Involved.

So far as pertinent to this appeal, Counts Three and Four were brought under Title 21, United States Code, Section 174 which in pertinent part provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

Appellant Was Not Deprived of a Trial by an Impartial Jury.

(1) In Non-capital Offenses There Is No Constitutional Right to Advance Information About the Jury.

The basic rule relative to the selection of juries in the Federal system was expressed by the United States Supreme Court in *Pointer v. United States*, 151 U. S. 396, 39 L. Ed. 214 as follows, on pages 407, 408:

“But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States v. Shackelford*, 18 How. 588; *United States v. Richardson*, 28 Fed. Rep. 61, 69. In the absence of such a rule or order, (and no such rule or order appears to have been made by the court below,) the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses.”

The sole Congressional restriction applicable to advance service of jury lists is contained in Title 18, United States Code, Section 3432 wherein provision is made for such advance service in treason and other capital offenses.

Since its inception this statute has been uniformly construed to have no application to non-capital offenses.

United States v. Williams, Fed. Cas. No. 16709,
28 Fed. Cas. 646 (1804);

United States v. Van Duzee, 140 U. S. 169, 35
L. Ed. 399 (1890);

Shelp v. United States, 81 Fed. 694 (C. C. A. 9th,
1897);

Brown v. Johnson, 126 F. 2d 727 (C. C. A. 9th,
1942), cert. den. 63 S. Ct. 39, 317 U. S. 627.

Appellant admits that at common law foreknowledge of the jury was limited to capital offenses (Appl. Op. B. 45, 47)⁴ and that there is no constitutional right to such foreknowledge (Appl. Op. B. 49). The courts are in accord (see *United States v. Van Duzee*, *supra*).

Accordingly, in non-capital offenses, "the jury list can't be required and need not be furnished in advance of trial" (*Hendrickson v. United States*, 249 Fed. 34 (C. C. A. 4th, 1918), at p. 35); and it has been held, in accordance with the above quoted principle of *Pointer v. United States*, *supra*, that the District Court has the discretionary power in non-capital cases to promulgate an order forbidding the court clerk to reveal the jury list in advance of trial to anyone but the Marshal.

Wilson v. United States, 104 F. 2d 81 (C. C. A.
5th, 1939), cert. den. 60 S. Ct. 89, 308 U. S.
574;

See:

Spivey v. United States, 100 F. 2d 181 (C. C. A.
5th, 1940), cert. den. 60 S. Ct. 1079, 310 U. S.
631.

⁴The abbreviation "Appl. Op. B." refers to Appellant's Opening Brief.

(2) The Action of the Trial Court in Denying Appellant's Request to Personally Voir Dire the Jury Did Not Deny to Appellant Any Constitutional Rights.

The trial court made its own examination of the prospective jurors, advising them of their duties as jurors, and questioning them for possible prejudice [R. 6-15]. Although the court did not allow appellant's counsel to personally *voir dire* the jury [R. 16], the court did propound to the jury all inquiries requested by appellant [R. 16-18, 22]. At all times the court was solicitous in behalf of appellant in determining whether it had put to the jury all questions desired by her counsel [R. 18, 20, 22, 24, 32-35]. Appellant now complains that this procedure violated her constitutional rights.

This contention has been consistently held to be without merit (*Ungerleider v. United States*, 5 F. 2d 604 (C. C. A. 4th, 1925), cert. den. 269 U. S. 574; *Murphy v. United States*, 7 F. 2d 85 (C. C. A. 1st, 1925), cert. den. 46 S. Ct. 120, 269 U. S. 584; *Kurczak v. United States*, 14 F. 2d 109 (C. C. A. 6th, 1926); *Paschen v. United States*, 70 F. 2d 491 (C. C. A. 7th, 1934); *Seadlund v. United States*, 97 F. 2d 742 (C. C. A. 7th, 1938)), the courts stating that the manner in which the examination of prospective jurors is conducted rests in the discretion of the trial court.

Speak v. United States, 161 F. 2d 562 (C. C. A. 10th, 1947);

Murphy v. United States, *supra*.

Also see following 9th Circuit Cases:

Bradshaw v. United States, 15 F. 2d 970 (C. C. A. 9th, 1926);

Bonness v. United States, 20 F. 2d 754 (C. C. A. 9th, 1927);

Frederick v. United States, 163 F. 2d 536 (C. C. A. 9th, 1947), cert. den. 68 S. Ct. 87, 332 U. S. 772.

The procedure followed by the trial court herein is not only sanctioned by the appellate courts (see cases cited *supra*), but is expressly provided for by Rule 24(a) of the Federal Rules of Criminal Procedure.

(3) The Government's Possession of a Loose-leaf Book Containing the Names of Past Jurors in Other Cases Did Not Deprive Appellant of a Fair Trial by an Impartial Jury.

During the time that peremptory challenges were being exercised, appellant's counsel approached the bench and stated to the trial court that counsel for the Government had a loose-leaf book which he referred to in his challenging of the jury [R. 27]. After some discussion concerning same, the challenges were concluded, and thereafter appellant's counsel suggested that the trial court examine said book *in camera* [R. 47]. Said examination was made by the court whereupon the court found that the information contained therein consisted merely of impressions of a jury gained by a particular Assistant United States Attorney in court after trial of a case; that it did not consist of an advance jury list; and that nothing contained therein showed any impropriety or unfair acquirement of knowledge which in any way impaired the fair impaneling of the jury in this case [R. 277-284].

Appellant now contends, without citation of any authority in support thereof, that the Government's possession of said book created a situation of inequality which deprived appellant of a fair trial by an impartial jury.

In *Christoffel v. United States*, 171 F. 2d 1004 (C. C. A. D. C., 1948), a similar contention was made. There, defendant's counsel advised the court that the Government's counsel had additional information before him with reference to the jurors, and moved the court for a copy thereof on the grounds that he was entitled to the benefit of the same information. Counsel also moved the court to have the jury panel disqualified. In upholding the trial court's denial of said motions the appellate court stated at page 1006:

"There is no merit in the contention that the court should have disqualified the panel or should have allowed appellant's counsel to examine the government's notes, if any, concerning it. There is no evidence, and counsel did not attempt to introduce any, that the government made any investigation, to say nothing of an improper one, of prospective jurors. Counsel's suggestion of what he thought probable is not evidence. The Sinclair case [*Sinclair v. United States*], 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258, involved offensive shadowing of jurors during a trial and is plainly not in point. And the government is not required to furnish the defense with notes it may have made for use in selecting a jury."

Also see:

Best v. United States, 184 F. 2d 131 (C. C. A. 1st, 1950), cert. den. 340 U. S. 939, rehear. den. 341 U. S. 907.

In the case at bar, as pointed out by the trial court, there is also no evidence, aside from counsel's suggestion of what he thought probable, that any improper investigation of prospective jurors was made or that the jury was not impartial. On the contrary, the impartiality of the jury is evidenced by their acquittal of appellant on Count Five of the indictment [T. 5].

The adequate interrogation of prospective jurors by the trial court, in aid of appellant's exercise of challenge [R. 6-18], together with appellant's failure to utilize all available challenges, and her acceptance of the jury [R. 34], further points out the fairness of the impaneling of the jury.

II.

Appellant's Arrest and Subsequent Search Did Not Violate Her Constitutional Rights.

(1) The Search of Appellant's Person Was a Lawful Incidence of Her Legal Arrest.

Appellant admits that the search in issue is valid if incident to a lawful arrest (Appl. Op. B. 64). She further admits that, by virtue of Title 26, United States Code, Section 7607, the arrest is lawful if the arresting officer had reasonable grounds to believe that appellant had committed the offense (Appl. Op. B. 65).

The fundamental concept that the existence of probable cause is tested on the basis of information received by the arresting officers from others, as well as their own personal observations, is also not denied (Appl. Op. B. 66); and see *Brinegar v. United States*, 338 U. S. 160 (1949); *Carrol v. United States*, 267 U. S. 132 (1925); *Gilliam v. United States*, 189 F. 2d 321 (C. C. A. 6th, 1951); *United States v. Li Fat Tong*, 152 F. 2d 650 (C. C. A. 2nd, 1945).

It is submitted that in the instant case, the observations of the arresting officers, together with the information imparted to them by Burton, meets the standards of probable cause necessary to justify an arrest. Appellant apparently does not quarrel with this conclusion, but asserts that the information received from Burton must be discounted as not being reasonably trustworthy. However, this is not a case in which the officers received an uncorroborated tip from an informer whose very identity was unknown; nor do the facts present herein justify the conclusion that the arrest was based solely on mere suspicion. Appellant's citation of authority in support of these principles is therefore inapplicable.

Officer Farrington had previously dealt with Burton; and the information that the latter gave to the officers so clearly fit in with and verified their own personal observations that it constituted reasonably trustworthy information. For example, the officers' own knowledge of Burton's phone call to an "Eddie" for narcotics, and his immediate meetings with appellant Eddie Hamer after arranging narcotic sales to Farrington, were sufficient to warrant a reasonable man giving credence to Burton's admission that appellant was his source of narcotic supply. See:

United States v. Volkell, 251 F. 2d 333 (C. C. A. 2nd, 1958);

Browner v. United States, 215 F. 2d 753 (C. C. A. 6th, 1954).

With regard to appellant's contentions that the arrest was a mere pretext for the search of her home and that she did not consent to the searches conducted therein, suffice it to say that all the evidence, including appellant's

own testimony [R. 399], clearly establishes that the arrest was consummated on the exterior premises of her home, and that the officers entered therein only at appellant's own insistence; that she told the officers to search her home before any search commenced [R. 342-343]; and that she voluntarily emptied the contents of her purse in response to Landry's query whether she had any money on her person.

III.

The Balance of Appellant's Assignments of Error Are Without Merit and Did Not Prejudice Her.

It is submitted that the balance of appellant's contentions raise no issue of merit or substance, and appellee therefore summarily answers them as follows:

(1) The contention of judicial misconduct is refuted by an examination of the record itself. Such an examination, it is submitted, would reveal that appellant's counsel invited the action of the trial court in enforcing its duty to preside over a fair and orderly trial. Accordingly, appellant cannot be heard to complain thereof. With reference to the trial court's conduct regarding the witness Burton, the court in *Tucker v. United States*, 5 F. 2d 818 (C. C. A. 8th, 1925), cited by appellant in support of her contention of misconduct (Appl. Op. B. 62), stated on page 824, relative to the Fifth Amendment, as follows:

“There is no higher nor more important duty resting upon the courts than to see that the citizen is fully afforded the rights and immunities guaranteed to him by the Constitution.”

Also see: *Gruher v. United States*, 255 Fed. 474 (C. C. A. 2nd, 1918), wherein the court commented on page 477:

“ . . . it is always the duty of a trial court to assist or direct a witness who is stumbling over a technical point. It cannot be error to ask a witness who declines to answer without his counsel being present whether he means to claim his privilege.”

(2) In an attempt to bring this case within the rule of *McNabb v. United States*, 318 U. S. 332, appellant states that she was afforded no opportunity to phone her attorney or husband and that she was coerced into making her confession (Appl. Op. B. 80). Nothing in the record, aside from appellant's own self serving testimony, sustains such conclusions [R. 233, 293, 326, 327]. Nor does the record reveal any lengthy or illegal detention of appellant prior to arraignment. The record, does however, show that at the time of arrest and again at the time of interrogation appellant was advised of her right to have an attorney [R. 215, 207], and was advised to contact one [R. 148].

As this court stated in *Haines v. United States*, 188 F. 2d 546 (C. C. A. 9th, 1951), cert. den. 342 U. S. 888, at pages 552 and 553:

“In the McNabb case, supra, 318 U. S. at page 346, 63 S. Ct. at page 615, the Court said that the mere fact that one makes a confession while in the custody of the police does not render the confession inadmissible. . . .

“Incidents of the oppressive nature shown in the McNabb case are wholly absent in the instant case and its facts do not even faintly resemble the McNabb situation. . . .

“The testimony in the case at bar fails to provide even an inference that an ‘illegal detention’ was deliberately resorted to as a *means*, or for the *purpose* of, extorting a confession or that the confession in this case were *due* to failure promptly to take appellant before a committing magistrate. . . .

“The facts in this case clearly show that appellant made a voluntary oral confession (complete in its details) immediately after he arrived at Eliason’s office on the morning of his arrest. . . .

“In the face of these impressive and convincing circumstances we are unable to conclude that we *must* hold, as a matter of law, that the *bare failure* to have appellant *immediately* arraigned after his arrest on March 3rd automatically translated the short questioning period which immediately followed his arrest into an ‘illegal detention’ the effect of which was to invalidate the oral confession then made. . . .”

The above cited opinion of the *Haines* decision applies with equal force to the instant case.

(3) The record does not sustain appellant’s contention that her counsel was prohibited from asking questions regarding the police report. Rather it shows that counsel elected not to pursue any inquiry thereon when advised by the court that the report could go into evidence if the subject were opened up [R. 240]. Having so elected, any claim of error was waived.

(4) Examination of the record amply justifies the conclusion that, as a matter of law, the evidence was sufficient to sustain appellant’s conviction.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

EUGENE N. SHERMAN,
*Assistant U. S. Attorney,
Attorneys for Appellee, United States of America.*

APPENDIX.

State of California, County of Los Angeles—ss.

I, the undersigned, hereby certify that:

Line 1, page 74 of the reporter's transcript in the matter of United States of America v. Edward Burton and Eddie Rena Hamer, No. 25,885, which reads:

"A. I gave part of it to him."

should read:

"A. I gave part of it to Hamer."

This correction is made pursuant to inquiry by United States Attorney as to the word "him," and it was found that my reporter's notes showed the word to be "Hamer."

IN WITNESS WHEREOF, I have hereunto subscribed my name this 15th day of April, 1958.

/s/ DON P. CRAM

Official Reporter

United States District Court

Subscribed and sworn to before me this 15th day of April, 1958.

MARIE G. ZELLNER

*Notary Public in and for the State
of California.*

No. 15689 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

FILED

JUN - 6 1958

PAUL P. O'BRIEN, CLERK

1
DAVID M. SPIEGEL,
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APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

Appellant was found guilty of violating Section 371, Title 18, U.S.C.A., Conspiracy, and was sentenced to one year's imprisonment. These proceedings were had in the United States District Court for the District of Oregon.

This Court has jurisdiction of this appeal pursuant to Section 1291, Title 28, U.S.C.A.

STATEMENT OF THE CASE¹

Appellant's exact age is not of record. She is so obviously elderly (she is less than five feet tall), that when her counsel asked her how old she was the following transpired (Tr. p. 1420 as corrected):

"A. Well, they advertised I am 77, but I am going to have a birthday in just a few days.

Q. That will make you 78?

(No answer)

The Court. All right, we won't press her for an answer on that."

Had the matter been pursued it would have been established that the birthday she was going to celebrate would be her 85th. Family records seem to satisfactorily indicate that appellant was born June 26, 1872.

She is a widow and has been a resident of Portland for many year and active in its civic affairs. She is founder of the City's Americanization Council, an association of patriotic organizations devoted to instructing aliens who are to become naturalized citizens in the principles of American citizenship, and is still active in its work (Tr. p. 1422). She has been a past active member of the advisory board of the City's Salvation Army and is now an honorary life member of that board (Tr. p. 1422). In 1954 she was named "Woman of the Year" by the Portland Chamber of Commerce in conjunction with the City's Women's Forum (Tr. p. 1422). She was engaged

¹ It would probably be impossible in any event to prepare a brief free from all fault and error in a cause of such length. If this Statement of the Case contains "argument," it is because of counsel's attempt to reduce the apparent complexity of the cause to the relatively simple issues appellant wishes to present.

for many years in the insurance business with her late husband under the firm name of the Davenport Insurance Agency.

It is appellant's principle contention that this indictment is mechanically so constructed that although her name appears in its title, it simply fails to include her within its allegations as a defendant charged with a crime. It even goes further than merely omitting her from its allegations: Those allegations of fact that it does contain limit the proof that can be adduced under them to proof of her innocence of any criminal act.

This was a joint trial. The indictment charges nine defendants and contains thirteen counts. The first twelve are substantive counts charging seven of appellant's co-defendants with violations of Section 1341, Title 18, U.S.C.A., Using the mails to defraud, and Section 77q(a), Title 15, U.S.C.A., Fraud in the sale of securities. The thirteenth count is based upon the allegations of fact of the preceding twelve counts (by incorporation by reference), and charges the defendants charged in those counts and appellant and the defendant Williams with violating Section 371, Title 18, U.S.C.A., Conspiracy, by conspiracy to commit the crimes set forth in the substantive counts.

Note that appellant is not charged in any of the substantive counts.

The factual basis of each count of the indictment is the joint activities of those charged in the substantive counts as described in the first paragraph of the first substantive count. It concerns their promotion and

organization of a forest products cooperative called the Mt. Hood Hardboard and Plywood Cooperative, and the sale of memberships therein, as a fraudulent scheme. The first paragraph of the first count describes at length in proper allegations of fact, the joint scheme to defraud that the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin are charged thereby with having jointly "devised and intended to devise" (and without the aid of appellant or any person "unknown") for the purpose of obtaining money and property from the purchasers of membership in the cooperative by certain specified false representations. This paragraph is thereafter incorporated by reference for the purpose of such allegations of fact in all subsequent counts including the conspiracy count.

The mechanics of this latter count are as follows: It lists the defendants named in the substantive counts together with the appellant and the defendant Williams (against whom the charge was dismissed during trial because of ill health) and states that they:

"did conspire, combine, confederate and agree with each other to commit the following crimes and offenses against the United States:

"Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to take the money and property from purchasers of memberships in the Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now re-alleged and incorporated by reference;

"Violations of Section 77q(a), Title 15, U.S.C., by employing said scheme and artifice to defraud,

obtaining money and property by means of untrue statements and omissions to state material facts necessary in order to make the statements true, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of the memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;

“Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of this indictment are here and now re-alleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of said conspiracy and to effect the objects of said conspiracy; and in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among others, the following, to-wit:”

From the foregoing appellant concludes that the indictment contains no allegations of fact concerning her.

She is not named as an accused in the substantive counts, nor does her name even appear in the body of those counts. They therefore contain no allegations of fact against her. The conspiracy count contains no independent allegations of fact, and therefore it contains no allegations of fact against her. The conspiracy count charges the existence of a conspiracy agreement upon her part only as a conclusion of law (as it does against all of the accused except for the incorporation by reference of the allegations of fact of the sub-

stantive counts) and as to her this conclusion is not one that can be drawn from these allegations.

The fact that appellant's co-defendants jointly devised the scheme described in the substantive counts and committed the crimes therein set forth, and nothing more, will not support a conclusion of fact or law that appellant is guilty of having agreed to their scheme and/or crimes. There is omitted from this indictment any allegations of fact against appellant. There are particularly omitted those allegations of fact setting forth the substance of a conspiracy agreement upon her part, which in its terms embraces the totally separate and distinct crimes and acts of her co-defendants set forth in the substantive counts.

Were it possible for an accused to waive the defect of being charged by a bare conclusion of law, the only corresponding benefit to the prosecution that could ensue would be permission to adduce evidence without preceding allegations of fact. Even this is irrelevant in this cause. There are allegations of fact set forth in the substantive counts of the indictment. The evidence adduced was necessarily intended to prove nothing more and nothing different than those allegations against those charged with the same, whether considered as such or as incorporated into the conspiracy count. Further, each and every act of the substantive counts are directly alleged to be overt acts upon the part of those charged therein. Because appellant cannot be held responsible for the criminal acts of others except by reason of a prior relationship making her responsible therefor, evidence of the overt acts of her co-defendants

is irrelevant as to her until evidence is first adduced of a conspiracy agreement upon her part making her responsible therefor.² Since the only allegations of fact contained in the indictment are alleged to be overt acts performed by her co-defendants, all that was and could be proven in this cause under these allegations, in so far as appellant is concerned, were these overt acts of her co-defendants, and nothing more to render them admissible against her.

There is even more to the matter than this, however: In the allegations contained in the first paragraph of the first count, it is charged that those defendants accused thereby "controlled" a corporation named the Davenport Corporation. The indictment alleges that these defendants caused this corporation to enter into a contract with the cooperative by means of which a large portion of the moneys paid in for memberships was converted to their use. It further alleges that these defendants caused options to be obtained upon real property for a plant site in the name of this corporation, and then purchased the property in its name and resold it to the cooperative at a large profit to themselves and the corporation they controlled.³

² Under allegations of fact against her permitting the same.

³ "As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name

A corporation is an artificial entity that can only act through its officers. Proof of the foregoing allegations required that the officers of the Davenport Corporation be identified and that evidence be adduced that they acted in conformance with these allegations. It also required that the relationship to them of the defendants charged be shown so as to establish that these officers were "controlled" by these defendants and that therefore these defendants are to be held directly responsible for their acts.

It so happens that appellant was President and principal stockholder of this corporation. In the course of this proof, therefore, she was identified as such and evidence was adduced that the corporation, through her, acted in conformance with the foregoing allegations. Further evidence was adduced of the surrounding circumstances to prove that she did so under the "control" of the defendants. There can be no other conclusion than that the evidence that touched upon appellant was introduced into the cause under these allegations and for the purpose of proving them against those charged in the substantive counts. When the prosecution rested, this was the status of the "case" against appellant.

Appellant can only guess how this indictment came to be drawn as it is. Apparently, proper procedural rules were followed to reach an erroneous substantive conclusion. Rule 8 of the Federal Rules of Criminal

of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate of Mt. Hood at great profit to said Davenport Corporation and defendants."

Procedure provides that it is not necessary that every defendant be named in every count. It needs no citation of authority, therefore, to point out that it is not necessary, where substantive counts and a conspiracy count are joined, that a defendant be charged in a substantive count in order to be charged in the conspiracy count.⁴ There is likewise a common practice of crowning a series of joint substantive offenses with a conspiracy count based upon them and, in such instance, of incorporating by reference the allegations of fact of the substantive counts in the conspiracy count for the purpose of supplying allegations of fact in the latter.⁵

⁴ Indeed, there are some substantive offenses that are limited to a definite class of persons such as bankrupts, federal officials, etc. One not of such class can aid and abet another who is in the latter's commission of a substantive offense, and can thus be charged as a conspirator while lacking the capacity to commit the substantive offense itself.

⁵ It is, however, a practice that does not have general approval. Where the conviction for conspiracy rests not upon the finding of an agreement, but upon the finding of combination or confederation implicit in concertive action in the commission of the substantive offenses, as in the case at bar, punishment upon the conspiracy count comes dangerously close to a second punishment for the same misdeeds. See the dissent in *Pinkerton v. U. S.*, 328 U.S. 640, and the cases and 1925 report of the Conference of the Senior Circuit Judges cited therein. See also the language of the Court in *Hamner v. U. S.*, 134 Fed. 2d 592, cited herein under appellant's first Assignment of Error.

The case at bar affords an excellent example.

The first paragraph of the substantive counts in itself charges conspiracy as conspiracy was defined by the instructions of the Court. The jury was instructed that this paragraph charges a joint scheme to defraud and the participation therein by each of the accused. They were then instructed that if they found the scheme existed, then each participant therein was liable for the substantive offense set forth in the second paragraph of each substantive count without regard to who might have done the actual mailing or made the particular sale described therein (Tr. pp. 1757 et seq.). It was only under the substantive counts that the jury

was instructed concerning the allegations of fact as they pertained to either count. The instruction upon the conspiracy count only defined the crime and did so substantially in terms of evidence of combination and confederation sufficient to support a conviction therefor. (There was no separate instruction as to appellant, for example, even though she was only charged in the conspiracy count. The guilt of one who participated in the joint scheme by knowingly and willfully assisting in the use of "existing corporations (such as the Davenport Corporation) to permit . . . one or more persons to siphon off money paid by the purchasers of membership . . ." was dealt with under the allegations of fact under the substantive counts: Tr. p. 1778.)

In *Pinkerton v. U. S.*, supra, conviction of the accused for the substantive offense was sustained upon the basis of evidence sufficient to support his conviction under the conspiracy count for conspiring to commit it. In the case at bar the same route was used to obtain the conviction of the accused upon the substantive counts with this important difference; it was a matter self-contained within the substantive counts themselves. While conviction under the substantive count in *Pinkerton v. U. S.*, supra, required a separate finding of ultimate fact, as it did in the case at bar, (that the accused was guilty of committing the substantive crime) in the converse situation in the case at bar conviction upon the conspiracy count required no further or different finding of ultimate fact than the substantive counts, either under the indictment or the instruction of the Court, because the finding that the accused had participated in a combination was a part of the substantive counts. A verdict of guilty of the conspiracy count was simply an affirmance that the accused had been found guilty of one or more substantive counts.

The foregoing is not all of the ill result in the case at bar. The evidence was conclusive that the defendant Errion was a swindler and that this was a fraudulent scheme by which he intended to benefit. Each of the accused had played a role in the venture. In the broad sense they had therefore participated in concert in a scheme whose ultimate object was fraud. Under the substantive counts the jury was instructed that an accused could be guilty thereof, and could have thus criminally participated in the scheme, if he made the alleged representations without regard to whether they were true or false, i.e., *without actual knowledge of their falsity and without acting in concert as to any other feature of the scheme* (Tr. pp. 1766-1779).

Upon this basis, and as such a participant, could not an accused be convicted of the conspiracy count because of participation in a joint scheme whose ultimate object was fraud, even though he had *no actual knowledge that his statements were false and therefore could not share that knowledge with others in common design?* (Tr. pp. 1778-1779). If conviction upon the conspiracy count is made to stand upon proof of an *agreement* whose sub-

stance was fraud and concerning which it had to be proven that each of the accused had participated therein with knowledge of that fraud shared with one another, the evidence was totally insufficient to support submission of the conspiracy count as to any but Errion and Munkers. These were the only two as to whom there was direct evidence of actual knowledge adduced from which an inference that it was shared between them with common design could be drawn. To the contrary, the Court instructed that belief that financing was assured for the project (the heart of Errion's fraud and the premise which destroyed the legitimacy of the venture, i.e., if there had been financing and the project had been financed, the project would have been as professed, but Errion would have made an improper profit upon the purchase of its plant site and there might or might not have been a claim against him for excessive organizational fees) would not exonerate an accused from liability of the substantive counts if they participated in the scheme "as outlined in Paragraph I," "if they knowingly and willfully made false promises or representations as to other matters." What other matters? It was not necessary, the Court instructed, that the Government prove all of the allegations with respect to the scheme or with respect to the alleged misrepresentations, "it is only necessary for the Government to prove sufficient fraudulent features or sufficient material representations to show that the scheme . . . existed" (Tr. p. 1775).

If a conspiracy indictment requires "a clear statement of the agreement which is proposed to be proven" (*Hamner v. U. S.*, 134 Fed. 2d 592, *supra*, at page 595) what is the agreement in the case at bar? Who could be made acquainted with the agreement against which he was to defend from this indictment when there were as many possible combinations and permutations for guilt of the substantive counts as set forth in the instructions and guilt of the conspiracy count was in itself a matter of further possible permutations and combinations? If the instructions of the trial court were a correct interpretation of the indictment, it is doubtful if a crime could be any more esoteric than the "conspiracy" charged here. Certainly no lay person could make an analysis of this indictment equal in breadth and scope to that of the trial court—and very few counsel. More than that, if crime can be so complex, who, ahead of time, could make a similar and continuing analysis of a business venture in which he was associated with others so as to ascertain whether or not federal criminal prosecution did not lurk therein?

What possible distinction can there be between the conspiracy count and the substantive counts in this cause when appellant, who was only charged in the former, could be dealt with complete facility in the instructions concerning the latter? Were it not for the more overriding premise illustrated by this fact, that the indictment fails to state a crime against her and that she was convicted upon no personal guilt, but solely for the crimes charged against her co-defendants, appellant would urge duplicity of the indictment as an assignment of error.

All these rules are correct as matters of procedure. They do not, however, in appellant's opinion, obviate the basic substantive rules that an accused is entitled to be informed of the crime of which he is accused in allegations of fact and that no one can be held responsible for the conduct of others except by allegations permitting prior proof of a relationship creating such responsibility. It would seem that if the desire is to join a series of substantive counts with a conspiracy count and to name an accused in the conspiracy count who is not named in the substantive counts, then care must be taken to charge such an accused in the conspiracy count with the substance of his own alleged agreement and in terms embracing his personal adoption of the acts of his co-defendants set forth in the substantive counts.

Had the Court granted appellant's motion for a separate trial, the fallacies of indictment and proof hereinabove outlined would have been made apparent.

Assuming, as one is entitled to assume, that the evidence adduced in a criminal cause relates only to the allegations of fact set forth in the indictment, none of the evidence in this cause relates to appellant. This evidence now occupies a Transcript of Testimony of some 1800 pages. The cause took three weeks to try and there were seven defendants. The offenses charged were a joint scheme and conspiracy, not simple matters in themselves.

A narrative account of the evidence cannot help but be involved and lengthy. The defendant Errion is the

principal figure throughout. It is actually he of whom the indictment speaks when it charges control of the Davenport Corporation, the execution of a contract in its name and the wrongful receipt of moneys through its use. But a very small portion of the evidence, however, touches upon his use of the corporation, and thus of appellant, as charged. However, a narrative account is not only of interest but of importance, in that it can be seen that in fact the evidence itself has no more to say about appellant than do the allegations of fact of the indictment. At the close of the prosecution's case, the evidence "against" appellant was literally the testimony of witnesses for the prosecution (specifically Bobbitt, Samuels and Piatt) that Errion was the recognized organizer and promotor of the cooperative and that this contract naming the Davenport Corporation was the contract by which he was to be compensated for his services. He directed its preparation by counsel (Bobbitt) and its execution by officers of the cooperative and appellant (Samuels). Pursuant to its terms he directed the purchase of the cooperative's plant site (Banks) and its resale to the cooperative at a profit to himself. All of the moneys specified in the indictment as wrongfully obtained were traced to Errion. In most instances the money was delivered to him personally although in the form of checks payable to the Davenport Corporation (Samuels). There was a checking account in the name of this corporation which was in fact Errion's (Piatt); the money deposited therein was his and withdrawals were at his direction (Piatt). Those witnesses testifying to the execution of the contract (Bobbitt) and

to the payment of the cooperative's money to Errion (Samuels), testified that they had never dealt with appellant, had never had contact with her and had never delivered any moneys to her. They had a full understanding that they were dealing with Errion and that Errion was dealing upon his own behalf. Appellant had simply not been involved in their transactions with him.

Pursuant to the foregoing, at the close of the Government's case, there was a complete void as to appellant. She was president of the Davenport Corporation and her signature was hers wherever it appeared. Whether or not she had had knowledge of the course that Errion was actually pursuing was a matter of sheer conjecture except in so far as it had been proven to the contrary; that hers was apparently a purely mechanical role, which required no such knowledge and from which no such knowledge need necessarily be inferred. (Precisely the conclusion of a Grand Jury that would lead to her omission from the substantive counts.) As a case for the defense, all that was lacking was appellant's personal protestation of innocence.

This had to await appellants' testimony in her own defense. She corroborated that her role was in fact mechanical and that she had been induced to play it, at no profit to herself, by representations of Errion similar to those by which he had induced the participation of other witnesses for the prosecution. She had been similarly deceived and had had no more knowledge of his actual intent.

Why did the Government seek to censure her through

the conspiracy count? Because of the enormity of Errion's crime; for associating with the man; for what she should have known about him and not what she actually knew about his scheme. This depended upon her previous contact with him and likewise had to await her own testimony. It was simply that she had been gulled by him before.

As to this, appellant's age and sex are as much facts as any other facts to be weighed. This is not a matter of sympathy or chivalry towards a woman in her eighties, but that experience has shown that elderly women are the usual targets of persons of charm and guile; they are more easily imposed upon. On the other hand, elderly women whose mental faculties have not only escaped the ravages of time, but have become sharpened in old age towards evil purpose, do not really exist. To have been a conspirator in this cause, as the law in fact defines a conspirator, appellant must be pictured as such a one, acting out of pure malice, for no gain to herself and simply for the pleasure of seeing a large number of persons swindled out their money by Robert Errion. This is not a rational speculation.

Appellant's first three Assignments of Error treat respectively with the failure of the indictment to state a crime against her, the irrelevancy of the evidence adduced to any issue of her guilt or innocence of any crime because of the limitations imposed thereupon by the allegations under which it was adduced (as Assignment of Error I-A) and the failure of the Court to grant her motion for a separate trial. These Assignments of Error require no narrative of the facts. For this

reason, as well as spacial limitations, such a narrative account is attached to this brief as an appendix. However, for full understanding, the reader may wish to consider it at this point and it is necessary for an understanding of appellant's fourth and fifth Assignments of Error.

ASSIGNMENT OF ERROR NO. I

The indictment fails to state facts sufficient to charge appellant with a crime.

POINTS AND AUTHORITIES

I.

A conspiracy count must set forth in allegations of fact, the agreement with which the accused is charged. His agreement is the crime of which he is accused and he is entitled to be informed of his crime so as to enable him to make his defense thereto. At the same time these allegations are necessary to enable the Court to ascertain that the crime of conspiracy has been properly charged in that the agreement alleged would in fact result in a violation of a substantive statute when carried into effect, and that agreements to violate that substantive statute are penalized by the conspiracy statute under which the charge has been brought.

Hamner v. U. S., 134 Fed. 2d 592.

Asgill v. U. S., 60 Fed. 2d 780.

U. S. v. Cruikshank, 92 U.S. 542, 23 Law Ed. 588.

Pettibone v. U.S., 148 U.S. 197, 13 Sup. Ct. 542,
37 Law Ed. 419.

State v. Van Pelt, 136 N.C. 633, 49 S.E. 177, 188,
68 L.R.A. 760, 1 Annotated Cases 495.

II.

In construing whether or not a conspiracy count contains factual allegations of the substance, object and purpose of the agreement with which the accused is charged, adequate for the foregoing purposes, the allegations of fact purporting to set forth the same will not be aided by the allegations of overt acts or the allegations of the acts of alleged co-conspirators. An overt act is not a necessary ingredient of the crime itself, but merely affords the point in time when the conspiracy agreement was carried into effect and prior to which any of the alleged co-conspirators could have withdrawn from the same, while until the accused's conspiracy agreement is properly alleged and proven as embracing the acts alleged upon the part of his alleged co-conspirators, he is not responsible for such acts and their performance is not admissible against him.

U. S. v. Amister, 273 Fed. 532.

U. S. v. Britton, 198 U.S. 199, 2 Sup. Ct. 31,
27 Law Ed. 698.

U. S. v. Beiner, 275 Fed. 704.

Hamner v. U. S., 134 Fed. 2d 592.

IV.

Nor, in considering the matter, will mere legal conclusions be accepted in the place of factual allegations.

U. S. v. Cruikshank, 92 U.S. 542, 23 Law Ed. 588.

Pettibone v. U. S., 148 U.S. 197, 13 Sup. Ct. 542,
37 Law Ed. 419.

Summary of Argument

Criminal conspiracy is truly a statutory crime. It is an agreement whose object is the performance of an unlawful act or the accomplishment of a lawful end by unlawful means where substantive statutes exist denouncing particular ends or means as unlawful and a further and separate statute exists that designates those substantive statutes and provides a penalty for those who enter into an agreement to violate them.

If the activity contemplated by the parties in their agreement, or performed by them pursuant thereto, would not, in the first instance, or does not, in the second, violate a substantive statute then there is nothing in such an agreement pertinent to either a substantive offense or to a conspiracy statute that has reference only to substantive offenses. It also follows that even though the activity contemplated or performed under the terms of the agreement may in fact constitute a substantive offense, an indictment for conspiracy cannot be lodged unless there is a statute permitting the same, i.e., one that imposes a penalty upon those who enter into an agreement to accomplish that particular substantive offense.

The accused's agreement to violate a substantive statute being his crime, the only fashion in which the crime can properly be charged is by citing a substantive statute and setting forth in allegations of fact the substance of the accused's agreement in terms of the conduct contemplated or performed thereby violative of that statute. The accused is always entitled to be made

acquainted with the crime with which he is charged so as to enable him to make his defense thereto, and conspiracy is no exception. Likewise the court must be able to ascertain that the indictment charges a crime in that the conspiracy statute under which the indictment has been brought penalizes agreements to violate the substantive statute to which the indictment refers and that the agreement alleged is in fact one to violate that substantive statute.

In the case at bar the conspiracy count makes no pretense of adequate allegations of fact of the substance of the agreement of the alleged co-conspirators. In itself it contains only conclusions of law, charging that the defendants agreed and conspired to violate particular substantive statutes. To ascertain the substance of the alleged agreement among the co-conspirators and to ascertain whether or not this agreement was in fact violative of these statutes, the court must turn to the substantive counts which are incorporated by reference into the conspiracy count for that purpose. To ascertain the crime with which they have been charged so as to enable them to make their defense thereto, the accused must do the same.

The substantive counts, however, are all charged as the joint acts of appellant's alleged co-conspirators alone. Indeed, in the conspiracy count itself they are charged as overt acts upon their part in furtherance of the alleged conspiracy of the whole. Obviously, when the substantive counts are so charged, no proof in support of them (or of the agreement supposedly embraced within them) is admissible against appellant

until a conspiracy agreement is first proven against her that includes within its terms an agreement to such actions upon the part of her co-defendants. Until that time, she is not responsible for those acts. Thus, the rule is that when testing whether or not a conspiracy count sufficiently alleges the substance of the agreement of the particular accused, allegations of the overt acts committed by alleged co-conspirators, as well as overt acts in general and legal conclusions, will not be considered. As a practical matter, it is of no avail to do so.

Thus, in testing the sufficiency of the conspiracy count in the cause at bar, the incorporation by reference of the substantive counts into the conspiracy count serves no purpose as to appellant and is to be disregarded. As a result, the conspiracy count contains only a conclusion of law as to her. Specifically, there are no allegations therein upon which there can be based proof, independent of proof of the substantive counts, of a purported conspiracy agreement upon appellant's part; in particular proof of her agreement to the commission of those substantive offenses by her alleged co-conspirators.

ARGUMENT

A conspiracy count must distinctly and directly allege the agreement with which the accused is charged.

It is stated in *Asgill v. U. S.*, 60 Fed. 2d 780 at page 785:

"When the charge is laid, however, the terms of the agreement must be set forth therein, and, until this is done, evidence of the conduct of the parties cannot be held competent or responsive to the unalleged agreement."

In greater detail, it is stated in *Hamner v. U. S.*, 134 Fed. 2d 592 at page 595:

"Now the gist of the charge of conspiracy is the agreement to commit an offense or a fraud against the United States. An overt act must be done pursuant to the agreement before . . . the crime is complete, but its essence lies in the agreement. That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it . . ."

. . .

"What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven. Such a pleading invites the abuse of the conspiracy statute which has often happened by stating several substantive joint offenses and seeking conviction not only for them but for a conspiracy as well. Such a thing is legally possible, but it emphasizes the necessity for clear-pleading of the conspiracy agreement as a thing to be proved separate and distinct from the substantive crimes."

Appellant need hardly point out that the last paragraph above cited is a precise description of the case at bar. The indictment charges a series of crimes and the conspiracy count has been patently added to crown the whole with a conviction for conspiracy based upon them. In the meantime, appellant is not even charged in any of these substantive counts and the need, as to her, of a clear statement of the conspiracy agreement of which she is accused, as against the substantive offenses of which she is not, becomes imperative.

In particular, where the charge is conspiracy to defraud, the allegations of the agreement must include

a factual description of the scheme to defraud. Only this will enable the court to ascertain that it is such a fraud as is contemplated by the conspiracy statute under which the charge is brought and the accused to defend upon the particular basis that one or more of such allegations of fact are untrue and that he did not in fact enter into an agreement to commit the substantive offense contemplated by the conspiracy statute under which the charge is brought.

It is stated in *U. S. v. Cruikshank*, 92 U.S. 542 (at page 558), 23 Law Ed. 533:

“ . . . the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances . . .

“ . . . it is in some States a crime for two or more persons to conspire to cheat or defraud another out of his property; but it has been held that an indictment for such offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat or defraud in the mode made criminal by the statute;”

In *Pettibone v. U. S.*, 148 U.S. 197, 13 Sup. Ct. 542, 37 Law Ed. 419, it is stated (in 148 U.S. 197 at page 203):

“ . . . when the criminality of a conspiracy consists of an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

“This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede . . .”

As can be seen from *Hamner v. U. S.*, supra, the allegations of overt acts will not be used to aid the allegations of the agreement. Nor are the allegations of the acts of alleged co-conspirators available for that purpose. It is stated in *U. S. v. Britton*, 108 U.S. 199 (at page 204), 2 Sup. Ct. 531, 27 Law Ed. 698:

“The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provisions of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae* so that before the acts done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.”

The logic of this rule is apparent. A conspirator is responsible for the acts of his co-conspirators in which he did not directly participate, but he cannot be made responsible for them until his conspiracy agreement is first proven to embrace them. As stated in *U. S. v. Beiner*, 275 Fed. 704 at page 706:

“There is a foundation in reason for such rule, because, after a conspiracy is formed, an overt act may be committed by one or more of the conspirators without the knowledge of the others.”

And finally, as can be seen from *U. S. v. Cruikshank*, supra, and *Pettibone v. U. S.*, supra, in the pleading of the object-purpose of the accused's agreement, legal conclusions will not be accepted as a substitute for factual allegations.

The allegations of the indictment in the case at bar are as follows:

Count I charges that the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin:

“. . . devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, hereinafter called ‘purchasers,’ by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.”;

there then following a detailed description of the scheme, artifice and representations of the above named defendants.

The conspiracy count charges that these defendants and appellant:

“ . . . did conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:

“Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to take the money and property from purchasers of memberships in the Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now re-alleged and incorporated by reference;”

that scheme, artifice and intent “as described in the first count” being the joint scheme, artifice and intent of appellant’s co-defendants.

The indictment continues:

“Violations of Section 77q(a), Title 15, U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue statements and omissions to state material facts necessary in order to make the statements true, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;”

that scheme, artifice, intent and those representations, again being described in the first count as the scheme, artifice, intent, and representations of appellant’s co-defendants.

The conspiracy count then continues:

“Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of

this indictment are here and now re-alleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among other, the following, to-wit:

There then follows a series of overt acts, the following of which contain appellant's name:

"7. On or about October 1, 1954 at Portland, Oregon, defendant Helen A. Davenport signed a contract as President of the Davenport Corporation with Mt. Hood Hardboard and Plywood Cooperative providing for payment of a fee to the Davenport Corporation of ten per cent of the total amount received from the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative . . .

"12. On or about December 7, 1954 at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of \$8,000.00, and transmitted said check to defendant Helen A. Davenport.

"13. On or about November 27, 1954 at Portland, Oregon, defendant Edgar Robert Errion obtained the check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of \$8,000.00, and transmitted said check to defendant Helen A. Davenport.

"14. On or about January 13, 1955, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to the Davenport Corporation in the amount of \$3,000.00 and transmitted said check to defendant Helen A. Davenport."

The foregoing allegations are *not* allegations of overt acts upon the part of appellant. They refer to the following allegations of Count I of the indictment:

“As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with the Davenport Corporation, a corporation controlled by defendants, by means of which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants, a large portion of the monies which had been received from said purchasers of Mt. Hood memberships;”

After accusing appellant of having conspired with her co-defendants to violate Section 134, Title 18, and Section 77q(a), Title 15, as a bare conclusion of law, the indictment *has not one single word further to say about her*. The substance of her agreement, the allegations by which it must be determined whether or not she had agreed to do such a thing as in fact violated those sections, must be drawn from the substantive counts. The substantive counts are upon their face not only solely the substantive offenses of her co-defendants, but are directly alleged in the conspiracy count to be overt acts upon their part in furtherance of the conspiracy of all.

Appellant was charged with nothing and tried for nothing. It is patent upon the face of the indictment that the only proof that was intended to be presented under it of the existence of a conspiracy agreement, or of the terms thereof, or of the parties thereto, (who, by being parties to it brought it into the existence sought to be established), is what is alleged in the substantive counts as having been done by those charged therein.

The indictment charges conspiracy against no one other than those defendants.

ASSIGNMENT OF ERROR NO. I-A

The indictment fails to state facts sufficient to charge appellant with a crime in that the evidence that could be adduced thereunder was necessarily irrelevant to any question of appellant's guilt or innocence of any crime because of the limitations of proof imposed by its allegations.

POINTS AND AUTHORITIES

I.

The allegations of fact set forth in the indictment, and facts tending to prove those facts, are the facts in issue in a criminal cause.

Rule 7(c), Federal Rules of Criminal Procedure.
42 C.J.S., Indictment and Information, Sec. 244,
page 1262; Sec. 253, page 1269.

II.

Evidence is relevant and admissible only if it relates to the fact in issue. All other evidence is irrelevant and inadmissible.

Wood v. U. S., 41 U.S. 342, 16 Pet. 342; 10 Law
Ed. 987.
Weinstock v. U. S., 231 Fed. 2d 699; 97 U.S.
App. D.C. 365.

III.

Evidence of the acts of alleged co-conspirators are not admissible against an accused until a conspiracy agreement is first proven upon his part that in its terms embraces such acts.

U. S. v. Beiner, 275 Fed. 704.

IV.

A conspiracy is a partnership in crime. Each conspirator agrees to join in the criminal venture and each by his agreement becomes an equal participant in the acts constituting the substantive offenses. By definition participation in a substantive offense is the subject matter of the conspiracy agreement.

Marino v. U. S., 91 Fed. 2d 691.

U. S. v. Delaro, 99 Fed. 2d 781.

U. S. v. Corlin, 44 Fed. Supp. 940.

Pinkerton v. U. S., 328 U.S. 640; 66 Sup. Ct. 1180, 90 Law Ed. 1489; Rehearing denied, 329

U.S. 818; 67 Sup. Ct. 26, 91 Law Ed. 697.

Curley v. U. S., 160 Fed 2d 229.

V.

This is so to the end that where a conspiracy count based upon incorporation of the allegations of substantive counts is joined with the substantive counts, failure of the substantive counts to charge a crime renders the conspiracy count fatally defective; and a verdict of not guilty of the substantive count, but guilty of the conspiracy count, is an inconsistent verdict. In like fashion, a prior trial and acquittal upon a conspiracy indictment bars a subsequent indictment and trial for the substantive offense alleged to have been the object of the conspiracy, as *res judicata* of the facts.

Spear v. U. S., 228 Fed. 485.

Boyle v. U. S., (8th Circuit) 22 Fed. 2d 547.

Ross v. U. S., 197 Fed. 2d 660.

Steckler v. U. S., 2d Circuit, 7 Fed. 2d 59, 60.

Dunn v. U. S., 284 U.S. 390.

Sealfon v. U. S., 332 U.S. 575, 68 Sup. Ct. 237, 92 Law Ed. 180.

Cosgrove v. U. S., 224 Fed. 2d 146.

VI.

It is impossible to adduce evidence that an accused has participated in a conspiracy agreement where (1) he is charged with a crime only in a conspiracy count of an indictment that joins substantive counts with a conspiracy count and (2) the conspiracy count contains no independent allegations of fact but only incorporates by reference those set forth in the substantive counts. Proof of his participation in the substantive offenses is immaterial and irrelevant to proof of those counts and there are no separate allegations of fact in the conspiracy count to permit proof that he is guilty of that count.

Boyle v. U. S., 22 Fed. 2d 547.

Cosgrove v. U. S., 224 Fed. 2d 146.

Summary of Argument

It was impossible to adduce evidence that appellant had participated in any conspiracy agreement. The only allegations of fact contained in the indictment are those set forth in the substantive counts. Proof of her participation in the substantive offenses was immaterial and irrelevant to proof of the substantive counts.

There being no other allegations of fact in the indictment, no evidence could be adduced concerning appellant in the cause.

ARGUMENT

This cause is based solely upon the allegations of fact set forth in the substantive counts, as such, and incorporated into the conspiracy count.

The most that can be said of the evidence adduced under these allegations is that it was sufficient to prove them. This evidence cannot concern appellant since these allegations contain no issue of fact concerning her.

Further, the substantive counts are alleged to be the joint acts of appellant's co-defendants and in particular, overt acts upon their part. Thus, the allegations of the substantive counts not only put no facts in issue as to appellant, but the facts they do put in issue are the overt acts of her co-defendants. In no event is the proof of these relevant as to appellant except upon prior allegations and proof of an agreement upon her part in which she embraces the crimes of her co-defendants and by which she becomes responsible therefor (*U. S. v. Beiner*, 275 Fed. 704).

This issue is completely outside the allegations of fact of the indictment. Therefore, proof thereof is completely outside the proof in support of these allegations (*Wood v. U. S.*, 41 U.S. 342, 10 Law Ed. 987).

The only interpretation that can be placed upon the evidence adduced in this cause is that it supports the allegations of fact set forth in the substantive counts. No sooner is something of further significance claimed for a particular item than the thought must be dismissed. Evidence is relevant only if it relates to facts in issue (*Wood v. U. S.*, *supra*). Facts in issue are the facts alleged by the indictment and such facts as tend to prove those facts (42 C.J.S., Indictment and Information, Sec. 244, p. 1262). A further significance would be irrelevant to the facts in issue and, as such, impossible of consideration.

There can be no contention that the evidence that touched upon appellant was adduced for the two purposes of substantiating the allegations of fact of the substantive counts against appellant's co-defendants and of permitting the jury to pass upon appellant's guilt or innocence of "conspiracy." One need only repeat that evidence was admissible in this cause only upon the ground that it was relevant and material to the allegations of fact set forth in the indictment. By definition, as "relevant and material" evidence, it has no other probative value. That it serves the purpose of supporting those allegations of fact precludes it from having any further significance. Conversely, if it is not relevant or material to these allegations of fact, it was wrongfully admitted.

The apparent theory upon which appellant was arrested and haled into court is that if a group of persons are properly alleged and proven to have committed a joint offense and to have entered into a conspiracy agreement to do so, then as incident thereto, the jury can pass upon the guilt or innocence as a "conspirator" of any person shown by the proof of such allegations to have been involved by them in their scheme. The indictment envisions a class of persons who are not guilty of the substantive offenses, but who, on the other hand, are not completely innocent of having been touched by the affair, either; a class of persons who can be convicted upon the basis of being thus half-innocent and half-guilty, who are to be called "conspirators" and whose censure does not depend upon allegations and proof as does the guilt of the real con-

spirators, but is solely a matter of discretion upon the part of the jury.

There is no such thing.

In a case such as the one at bar where the substantive counts charge executed crimes and there are no disabilities barring prosecution of the accused for those crimes and the conspiracy count is based solely upon the accused's participation therein, a conspirator is first of all one who by his deeds has made himself subject to punishment under the substantive statute as a party to a violation thereof.

It is stated in *Pinkerton v. U. S.*, 328 U.S. 640; 66 Sup. Ct. 1180, 40 Law Ed. 1489; rehearing denied, 329 U.S. 818; 67 Sup. Ct. 26, 91 Law Ed. 697; (In upholding the conviction of a conspirator upon a substantive count as to which there was no evidence of his guilt other than proof of his conspiracy agreement and of the commission of the substantive offense by his co-conspirator); at 328 U.S. 640 at page 647:

"The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime . . . The rule that holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. The principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."

This statement is summed up in *Curley v. U. S.*, 160 Fed. 2d 229 at page 237 as follows:

“ . . . and that each participant in a conspiracy is liable upon substantive counts for all acts committed by another conspirator pursuant to the conspiracy, are settled by *Pinkerton v. U. S.* (1946), 328 U.S. 640; 66 Sup. Ct. 1180.”

Under an indictment such as this, a “conspirator”, therefore, is a party to a crime who is a “conspirator” because a statute says that he can be punished for his agreement to commit the crime over and above the punishment that can be imposed upon him for committing the crime itself.

It is patent, for example, that under an indictment drawn as the one in the case at bar, where the allegations of the conspiracy count are merely a repetition by incorporation of the allegations of the substantive counts, that the facts to be proven to support conviction of both counts are necessarily as synonymous as the incorporation by reference purports them to be. Guilt of the conspiracy count is only a matter of a different (or additional) inference drawn from the same set of facts.

That this is the actual state of the matter can be seen from those cases in which an accused has been acquitted of one or the other of the counts, but found guilty of the other, under like indictments as the one in the case at bar.

Such a verdict is uniformly held to be inconsistent. The courts are divided as to whether or not such inconsistency voids the conviction upon the one count, but

all agree upon the inconsistency itself. Where such convictions have been upheld, the reason given has been essentially that the inconsistency is the result of an act of leniency upon the part of the jury in favor of the accused. Where such convictions have been reversed, the reason given has been essentially that the acquittal removed from the cause all facts relevant to the allegations of counts upon which there has been acquittal and there being no separate allegations in the other count under which that count could be separately proven, the verdict must be set aside.

It is stated in *Boyle v. U. S.*, (8th Circuit) 22 Fed. 2d 547 at page 548, in reversing a conviction of the accused for "knowingly" maintaining a nuisance because the jury had acquitted them upon a count of conspiracy to maintain the same:

"There exists a diversity of opinion among the various federal courts as to the effect of an inconsistent verdict, where there are different counts in an indictment. On the one hand, it has been held that, where a jury convicts upon one count and acquits upon another, the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions. Such is apparently the holding in the second, sixth and seventh circuits (citing authority) . . .

"On the other hand, it has been held under similar circumstances that the conviction will not be allowed to stand, unless the verdict is supported by evidence other than the facts pleaded in support of the counts upon which acquittal has been had. This is the view adopted in this circuit and apparently in the third. (citing authority)."

In *Ross v. U. S.*, 197 Fed. 2d 660, such a conviction

was upheld, the Court stating upon page 662 (citing the language of *Steckler v. U. S.*, 2d Circuit, 7 Fed. 2d 59, 60):

"The most that can be said in such cases is that the verdict shows that either in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they have no right to exercise, but to which they were disposed through lenity."

In *Dunn v. U. S.*, 384 U. S. 390, the same ruling obtained, the Court again citing the language of *Steckler v. U.S.*, supra.

On the other hand the same subject has been under discussion where there has been a trial and acquittal for conspiracy followed by a subsequent indictment for the substantive offense. Here, where the verdict of a jury is not involved, the courts have uniformly recognized the identical factual basis for the two charges by holding that the second indictment must be dismissed because the prior trial and acquittal has been res judicata as to the facts.

In *Sealfon v. U. S.*, 332 U. S. 575, 68 Sup. Ct. 237, 92 Law Ed. 180, this circumstance was before the Court. The accused had been acquitted of conspiracy with one Greenberg to submit a fraudulent claim, and was then charged with the substantive offense of aiding and abetting Greenberg to submit the claim. In 332 U.S. 575 at page 579 the Court states:

"Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to con-

nect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted . . . the jury was told petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg . . . Viewed in this setting the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

“So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical . . . petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way . . .”

The subsequent indictment was dismissed.

The same question was before this Court in *Cosgrove v. U. S.*, 224 Fed. 2d 146. Here this Court held an acquittal of conspiracy with officers of the Internal Revenue Department to submit fraudulent estate tax returns was *res judicata* as to the facts of a subsequent indictment for aiding and abetting those officers to submit fraudulent estate tax returns and barred the subsequent indictment. Syllabus 5 states:

“Defendant’s acquittal of conspiracy, with officer of Department of Internal Revenue, to defraud the United States in respect to several estate tax returns and of covering up a material fact in an estate tax return, was *re judicata* as to charges that defendant had, by agreement with officer, wilfully aided and assisted in, procured, counseled and advised the preparation and presentation of false and fraudulent estate tax returns.”

Upon page 151, this Court states:

“The close relationship between conspiracy and aiding and abetting was clearly recognized by the Supreme Court in *Pinkerton v. U. S.* . . .”

The Court then proceeds to offer other illustrations of this point.⁶

In the case at bar the substantive counts are meant to put in issue the facts from which an inference of the commission of the crime of conspiracy could be drawn. They put no facts in issue as to appellant, and the indictment puts no other facts in issue.

If under an indictment such as this a verdict of guilty of the conspiracy count would be inconsistent with a verdict of acquittal upon the substantive counts, appellant's conviction of the conspiracy count without any preceding issue of fact whatsoever concerning her in the substantive counts, is obviously inconsistent to the point of an impossibility.

If a trial and acquittal upon a conspiracy charge can bar a subsequent indictment and trial upon the substantive offense alleged in the conspiracy indictment to have been the object of the conspiracy, because the two can be factually identical, it is obvious that they *must* be factually identical in an indictment wherein the conspiracy count is joined with the substantive counts and is based upon the latter's allegations by

⁶ For a further illustration of the factual identity of the two counts under such an indictment as here see *Spear v. U. S.*, 228 Fed. 485. Upon page 486 the Court states:

“At the threshold of the cases is the question of the sufficiency of the counts for fraudulent use of the mails. If they fall, that for conspiracy depending upon them falls also.”

their incorporation. In such an indictment there can be no issue of fact concerning an accused charged only in the conspiracy count. The only allegations raising issues of fact are in the substantive counts and the accused is not charged therein. He has not been charged with the facts of the crime.

One recalls the words of the Court in *Boyle v. U. S.*, supra: That the conviction will not be allowed to stand "unless the verdict is supported by evidence other than the facts pleaded in support of the counts upon which the acquittal has been had." A conviction cannot be allowed to stand where the only facts pleaded are those in support of counts that omit the accused and the verdict must be supported by facts other than those alleged in support of those counts—of which there are none.

The most vigorous apology which can be made for the fashion in which this indictment treats of appellant can only amount to a contention that the substantive counts beg the question as to whether or not she knowingly participated in them, leaving the matter open in so far as the conspiracy count is concerned. This contention refutes itself. As the allegations beg the question, so must any proof of which it is to be said: "This evidence proves these allegations."

* * *

None of the propositions appellant has advanced in these first two Assignments of Error are mere abstract propositions of law. They had a practical effect so devastatingly unjust that it is patent that no one was aware of it.

Just as appellant was without a charge, so was she without a defense; just as her guilt was not in issue, neither was her innocence.

The defense of her co-defendants was clear. They could defend against the allegations of the substantive counts and it followed that if innocent of those counts they were innocent of the conspiracy count. What manner of defense was it for appellant to assert that she was innocent of the substantive counts when she was not charged with having committed them?

The indictment is clear. Appellant is not accused in the substantive counts. The jury was not to be concerned with whether she was or was not guilty of those counts; that was not an issue submitted to them. The indictment assumes that as a matter of law, not only is her actual innocence of the acts charged against her co-defendants immaterial to her conviction under the conspiracy count, assuming that she was innocent of their crimes and was omitted from the substantive count because of such innocence, but that even the very question of whether she is guilty or innocent of the substantive offenses is immaterial to her conviction for "conspiracy" to commit them.

But that is not the end of the matter. Not only did the indictment render immaterial to her conviction her innocence of the acts charged against her co-defendants from which *their* guilt of the conspiracy was to be inferred, but as one might surmise, appellant was affirmatively exonerated of any criminal complicity in those acts by the prosecution's case in chief. She was literally

robbed of a defense, if she needed any, by the prosecution proving her innocent of the substantive counts before she had a chance to prove herself innocent thereof so as to free herself of the conspiracy count if, despite the failure of the indictment to charge her with the substantive counts, the conspiracy count nonetheless charged her therewith in some fashion.

When the indictment alleges that Errion, Munkers, Locke, Bones, Montgomery, Wright and Martin caused the Davenport Corporation to execute a contract for the promotion of the cooperative, the reverse side of the coin is that appellant did not, even though the contract was executed in the name of the corporation by her signature as its president. There is not even room for speculation after one reads the testimony of the witnesses Bobbitt and Samuels and the defendant Williams.

When the prosecution finished proving through the witnesses Piatt and Samuels that the monies that went to the Davenport Corporation went into Errion's pocket and not appellant's, even though she was president and principal stockholder of this corporation, what remained for appellant to say about these monies?

These are not merely the facts; *these were the facts proven by the prosecution in its case in chief*. Proof of one's innocence is not proof of one's guilt, even when one is charged with "conspiracy."

One may read this record, but can anyone charge appellant with an intent to mislead if she asserts that it follows the allegations of the indictment? After the

prosecution proved the allegations of fact of the substantive counts against appellant's co-defendants, appellant took the stand and corroborated that part of the evidence against them that had touched upon her.

This was the "charge" against appellant; this was her "defense" to that charge"!

ASSIGNMENT OF ERROR NO. II

Appellant was entitled to relief from the prejudicial joinder with her co-defendants.

POINTS AND AUTHORITIES

The Court could grant such relief in its discretion.

Rule 14, Federal Rules of Criminal Procedure.

ARGUMENT

Obviously, appellant contends in her preceding two Assignments of Error that it was clearly improper to require her to stand trial at all. In a sense, therefore, this assignment of error is superfluous.

If, on the other hand, the Court disagrees with appellant's first two Assignments of Error and finds that the indictment and proof in this cause did place appellant in some fashion legitimately in jeopardy, then appellant urges that there is substance to this Assignment of Error.

In this cause, in any event, the prejudice that resulted from the joinder was that appellant was tried for

the crime of her co-defendants and for no personal guilt of her own.

In addition to the mechanics of the indictment that have already been referred to, there were the actual instructions concerning appellant which were as follows: There was no separate instruction concerning her; there were only these references to the fact that she was charged only in Count XIII:

"I think this is an appropriate place to point out that, with the exception of Mrs. Davenport, a separate crime or offense is charged against each of the defendants in each count of the indictment . . ." (Tr. p. 1774).

"These counts charge all of the defendants who are on trial, with the exception of Mrs. Davenport, with violation of this law." (Tr. p. 1788).

"Each of the defendants, with the exception of Mrs. Davenport, is charged in every count." (Tr. p. 1801).

Even though she was not charged in the substantive counts, the jury was instructed concerning her as if she were. Under the instructions concerning the substantive counts the jury was instructed concerning appellant as a participant in the joint scheme set forth in Count I as follows (Tr. p. 1778):

"There was evidence in this case that one or more of the defendants named in the indictment organized the Mt. Hood Hardboard and Plywood Cooperative, as well as certain other cooperatives and corporations, and that they used these corporations as well as existing corporations, such as the Davenport Corporation, for the purpose of siphoning off money paid in by the purchasers of memberships in the Mt. Hood Cooperative. If you

find that the Government has proved this scheme to defraud as to one or more of these defendants, the first essential element in the indictment will have been satisfied . . . You will next consider which defendants, if any, participated therein. If you find that one or more of the defendants devised or participated in a scheme to defraud by knowingly and willfully assisting in the setting up of corporations or the use of existing corporation to permit him or one or more persons to siphon off money paid in by the purchasers of memberships in the Mt. Hood Cooperative, then that defendant is chargeable with participation in the scheme, even though he himself, never made any representations of any kind to a prospective purchaser of memberships . . . and likewise he may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members."

Participating in the scheme set forth in Count I was not a crime with which appellant was charged and against which she had any opportunity to defend. This instruction was clearly erroneous.

Upon what basis could appellant's standard of guilt be lumped together with the standard of guilt set for her co-defendants by the allegations of fact of the substantive counts? Certainly that she was not charged in the substantive counts, and they were, creates a distinction between them cannot be so lightly brushed aside.

Further, what evidence was there that could possibly support an instruction concerning appellant under Count I? What evidence was adduced under that count of appellant's knowing and willful participation in a

scheme to siphon off money into Errion's pocket through the use of the Davenport Corporation? The testimony of the witnesses Bobbitt, Samuels and Piatt created a complete void in the proof of those counts concerning appellant, matching the like void in the allegations of fact. The allegations of the substantive counts having been proven; that those charged therein, and specifically Errion, as a part of *their* scheme, controlled the Davenport Corporation and used it towards that end, upon what basis was the jury now to hazard under those counts exactly to the contrary of their allegations; that appellant could be considered as an accused therein and that the allegations as in fact set forth were incorrect in that appellant had not been "controlled" by Errion but had played a knowing part in the scheme?

ASSIGNMENT OF ERROR NO. III

The Court erred in instructing the jury concerning appellant as set forth in Assignment of Error No. II.

ARGUMENT

This is a formal assignment as error of the instruction set forth *haec verba* in Assignment of Error No. II.

No specific exception was taken to this instruction; counsel for appellant did, however, except to the submission of the cause as to appellant (Tr. p. 1807).

These instructions have been dealt with more fully in Assignment of Error No. II because, once again, more to the heart of the matter is that they illustrate

the more basic premises set forth in preceding and subsequent Assignments of Error that the indictment fails to charge appellant with a crime and that the evidence was insufficient in any event to sustain her conviction of the crimes charged against her co-defendants.

ASSIGNMENT OF ERROR NO. IV

The evidence is insufficient to sustain appellant's conviction.

POINTS AND AUTHORITIES

I.

A count charging conspiracy is an accusation of a distinct crime, and evidence to support it must be so clear and convincing as to leave no reasonable doubt.

U. S. v. Silva, 131 Fed. 2d 247.

II.

A conspiracy is a partnership in criminal purpose. The gist of conspiracy is a meeting of the minds for a definite criminal purpose ripened by doing an overt act. The proof requires proof of an unlawful agreement and participation therein with knowledge thereof.

Sprague v. Aderhalt, 45 Fed 2d 790.

Marino v. U. S., 91 Fed. 2d 691.

Dickerson v. U. S., 18 Fed. 2d 887.

III.

The evidence must show either concertive action in the commission of an unlawful act or other facts or

circumstances from which a natural inference arises that unlawful acts were in furtherance of conscious mutual agreement to commit them.

Windsor v. U. S., 286 Fed. 51; certiorari denied, 43 Sup. Ct. 523, 262 U.S. 748, 67 Law Ed 1212.

Braverman v. U. S., 125 Fed. 2d 283, 63 Sup. Ct. 99, 317 U.S. 49, 87 Law Ed. 23.

11 Am. Jur., Conspiracy, Sec. 4, p. 544.

IV.

To support a conviction for conspiracy based upon circumstantial evidence, the conclusion to be drawn from the circumstantial evidence must exclude every other reasonable hypothesis than that of guilt.

Copeland v. U. S., 90 Fed. 2d 78.

Bryan v. U. S., 175 Fed 2d 223, certiorari granted, 70 Sup. Ct. 69, 338 U.S. 813.

V.

Mere suspicion is insufficient.

Garrison v. U. S., 163 Fed. 2d 874.

Summary of Argument

Appellant does not intend to assume for the purpose of this Assignment of Error that she was charged in the substantive counts or that the conspiracy count contains any other allegations of fact than those of the substantive counts incorporated by reference. In the preceding Assignments of Error appellant has shown that the indictment contains no allegations of fact against her and that those it does contain against her co-defendants

necessarily limited the proof to be adduced under them, in so far as it might touch upon her, to proof of her innocence. In this Assignment of Error appellant will simply move on to the evidence itself that conformed to these allegations, comparing it with the requirements of proof for guilt of conspiracy, solely for the purpose of making such comparison.

ARGUMENT

Conspiracy is a distinct crime subject to exact definition. It consists of an unlawful agreement between two or more persons, knowingly participated in by the accused. One must distinguish between approaching the proof frontally, so to speak, from the point of view of proving the existence and terms of an unlawful agreement among a group of alleged conspirators, and of backing in to the same proof from the point of view of each of the individual accused who must be proven to have participated in the unlawful agreement with knowledge of its existence.

The evidence in this cause, considered solely as evidence in support of conviction for conspiracy of alleged co-conspirators, has an unusual aspect distinguishing it from the ordinary case. There was nothing susceptible of the interpretation of being direct evidence that any of the alleged co-conspirators, other than Errion and Munkers, knew of their own knowledge that Errion's representation that he was negotiating with a group of named persons who would finance the project was false.

The evidence one usually finds in such a case is lacking. None of the alleged co-conspirators took the stand to admit that he knew that his representations were false and to identify others whom he declared shared that knowledge with him with common intent to defraud the public. The substantive offense was fraud and there is no requirement that criminal intent need be found merely because a representation is made that happens to be false. (The defendant Martin's acquittal does no violence to reason, for example.) The case does not concern, say, personal contact with proscribed alcoholic beverage as does *Marino v. U. S.*, 91 Fed. 2d 691, or *Dickerson v. U. S.*, 18 Fed. 2d 887.

The unhappy practice of crowning a series of substantive counts with a conspiracy count that does no more than incorporate the allegations of the substantive counts renders it most difficult in the case at bar to ascertain the precise substance of the conspiracy agreement of which the accused are charged. Adding to the difficulty is that each of appellant's co-defendants could be found guilty of the substantive counts without actual knowledge that a fraud was being perpetrated, either being shared with others or being possessed by themselves.

Nor do the instructions aid in the matter.

Since the first paragraph of the first count contains all of the allegations of fact in the cause, this is where the Court dealt with the allegations of fact in its instructions. The jury was instructed that paragraph one alleged a joint scheme and artifice to defraud and charged

the defendants with having participated therein. A defendant who had done so was by virtue thereof liable for each of the individual mailings and sales set forth in Paragraph II of each of the substantive counts without regard to who did the actual mailing or made the sale specified therein (Tr. pp. 1757 et seq.).

Instructions upon the conspiracy count were limited to general definitions of conspiracy, overt acts, etc. They did not include any definitions of the terms of an alleged conspiracy agreement under the allegations of fact (Tr. pp. 1970 et seq.). As the Court stated (Tr. p. 1797):

“I shall not discuss the facts with reference to this conspiracy count because all this has been covered in the previous instructions . . .”

The Court defined the matter of conspiracy not so much in terms of an agreement as in terms of the evidence of combination or confederation that would support conviction. The original definition was as follows (Tr. p. 1970):

“A conspiracy may be defined as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. The gist of the offense is the unlawful combination or agreement to violate the law.” (Emphasis added)

This is immediately followed by a reference to “the conspiracy or agreement” and by instruction upon the lack of necessity of a formal agreement, it being sufficient if “two or more persons, in any manner or through any contrivance, impliedly or tacitly, come to a mutual

understanding to accomplish a common and unlawful design, knowing its object.”

Thereafter the Court used the word “conspiracy” without further substantial use of the word “agreement.”

Under the substantive counts the jury was instructed that an accused could be guilty thereof, and thus could have criminally participated in the scheme set forth therein, if he made any of the alleged representations without regard to whether they were true or false.

“However, statements made without regard to whether they were true or false and put forth without any basis for the purpose of obtaining money or property from another are fraudulent.” (Tr. p. 1766).

He could thus participate in the scheme even though he did not act in concert with anyone:

“In other words, one defendant may be guilty because he has devised or participated in a scheme to defraud by siphoning off money through the use of the devise described in Count I, while another defendant *who did not act in concert with the first defendant and did not devise or participate in such scheme to siphon off money*, may also be guilty, if he knowingly and willfully made false representations for the purpose of selling membership to a prospective purchaser.” (Emphasis added) (Tr. p. 1779)⁷

⁷ During the taking of exceptions the Court explained to counsel that these instructions were intended to cover the individual liability of an accused for an individual scheme consisting of his own representation made without regard to whether it was true or false (Tr. pp. 1811-1812). However, each accused was charged as a participant in a joint scheme and this was the ultimate finding that the jury was to make. For example, there should have been liability only upon a substantive count concerning a sale

And finally the jury was likewise instructed, that it made no difference whether or not an accused believed that financing had been assured and that

“Phillips or Howard or other persons would loan the cooperative \$4 or \$5 million dollars with which to construct a plant . . . if they knowingly and willfully participated in the scheme to defraud as outlined in Count I, or if they knowingly and willfully made false promises or representations with reference to other matters to prospective purchasers.” (Tr. p. 1779).

Disregarding all of the permutations of “combination” and “confederation” of *action* possible under the substantive counts which would render an accused liable upon those counts, and starting afresh with the conspiracy count itself to ascertain therefrom the terms of the *agreement* charged thereby, one thing is certain: The essence of the latter count is an agreement to perpetrate a fraud for the substantive crimes referred to therein are using the mails to defraud and fraud in the sale of securities. As to this, it is clear that for such an agreement to exist and for any of the accused to have been a party thereto, two or more of the alleged conspirators had to participate therein with knowledge of

made through the particular accused's representation if that representation is to be considered as his individual scheme. When his own individual scheme created liability upon his part for a sale and mailing made pursuant to the individual scheme of another, “joint participation” was necessarily involved. Furthermore, as will be pointed out, should not the Court have withdrawn the submission of the conspiracy count as to each accused as to whom these instructions were apropos and not abstract? If the evidence concerning him was susceptible of this interpretation, did not this fact in itself render it impossible to say that every reasonable hypothesis other than that of actual knowledge and of knowledge shared could be ruled out in so far as his guilt of the conspiracy count was concerned?

the fraud shared between them as the substance of an agreement.

These are the ultimate findings required for conviction upon this count.

At a very minimum, to avoid an inference based upon an inference, the evidence to support this as to each accused had to be direct evidence of actual knowledge of the fraud. This in itself would not necessarily require that the jury find that a conspiracy agreement existed or that an accused with such knowledge participated therein; but, without such direct evidence of actual knowledge, the jury could draw no single inference that such knowledge was shared with common design and in common agreement.

Lesser evidence of knowledge than direct evidence thereof would require two inferences, first, of knowledge, and secondly, of knowledge shared. Circumstantial evidence of knowledge, however, cannot preclude, as a matter of law, a reasonable hypothesis of actual ignorance—particularly in this cause where the question to be resolved was whether the accused had been deceived by Errion, the master swindler, or had actual knowledge of what the man was up to.

The fraud in this case, at least in so far as the fraud to be shared under the conspiracy count is concerned, is not so complex as a first reading of the instructions upon the substantive counts may make it appear. It is simply that the Mt. Hood Cooperative was a fraud and a swindle because it could not come into existence as represented; there was no one who had

assured Errion that financing would be provided for the construction of its plant. This was a lie upon his part.

If this is the knowledge that is to be shared, it is obvious that in so far as appellant is concerned, the evidence does no more than cast suspicion upon her in no greater measure than it is cast upon any of the prosecution's witnesses who similarly served his convenience but whose innocence is to be presumed.

Of course, appellant was not even a "participant" in any unlawful agreement if any had existed, as required by the general law of conspiracy in order to be guilty of the crime. In the final analysis the Grand Jury concluded that appellant did not participate in the substantive offenses; that there did not appear in the facts before it acts committed by appellant that in themselves were either directly a part of the substantive offenses or indirectly such a part thereof as to show an intent to commit the substantive offenses.

Yet this is precisely what must be alleged and proven to convict appellant of the crime of conspiracy under the theory upon which the indictment purports to charge the crime against each of the accused.

How far short of supporting appellant's conviction does the proof fall? It is a patent absurdity that appellant, in her eighties, with a lifetime of civic virtues behind her, knowingly intended to see a theft of a half million dollars from the public to no gain to herself, and to end her days as a convicted felon, all solely as a favor to Edgar Robert Errion. No one can seriously entertain

this thought, and there is not one scintilla of evidence to support it.

* * *

A conspiracy is a partnership in criminal purpose. The gist of the conspiracy is a meeting of the minds for a definite criminal purpose that ripens into the crime by the doing of an overt act. The proof requires proof of an unlawful agreement and participation therein with knowledge thereof (*Marino v. U. S.*, 91 Fed. 691; *Dickerson v. U. S.*, 18 Fed. 2d 887).

As is stated in *U. S. v. Silva*, 131 Fed. 2d 247 at page 249:

"There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The Government merely fails in its proof when its evidence but creates a sort of mystery as to which one guess is as good as another."

This Court stated in *Terry v. U. S.*, 7 Fed. 2d 28 at page 30:

" . . . a conspiracy is not an omnibus charge under which you can prove anything and everything, and convict of the sins of a lifetime."

The distinction between proving the existence of an alleged conspiracy agreement among a given group of conspirators and proving that a particular accused was a part of the conspiracy is well illustrated by the following two citations. Speaking of the former the Court in *Windsor v. U.S.*, 286 Fed 51, states as follows upon page 53:

"This Court held in *Davidson et al v. U. S.*, 274 Fed. 285, that a verdict of guilty of conspiracy

may be sustained by evidence showing a concert of action in the commission of an unlawful act or by proof of other facts and circumstances from which the natural inference arises that the *unlawful overt act* was in furtherance of a common design, intent and purpose of the alleged conspirators." (Emphasis added)

Viewing the matter from the point of view of the particular accused, the Court states in *Dickerson v. U. S.*, 18 Fed. 2d 887 at page 893:

"To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either expressed or implied, and participation with knowledge of the agreement."

Appellant will not belabor the evidence that touched upon her. It is set forth in the Appendix. It simply affords a factual basis for the conclusion that appellant did not criminally participate in the substantive offenses. She had no dealings with the public and received no financial gain. Her activities were solely confined to being used as a personal convenience by the defendant Errion. She did not participate in an unlawful overt act. Nothing that she did would in itself convey to a person doing it, either that they were performing an illegal act or that what they were doing was a necessary ingredient to an illegal scheme.

The issue posed by the allegations of the substantive counts is not appellant's motive in being of convenience to Errion, but Errion's motive in using appellant as a convenience to himself. This is no issue as to appellant.

It is patent that the "participation" required of an accused under the general law of conspiracy is, in the case at bar, participation in the substantive offenses as charged against appellant's co-defendants in the indictment. Even if one refuses to characterize appellant's "participation" in the fashion set forth in the allegations of the substantive counts and insists upon brushing aside all frailties of the indictment, demanding the right to draw independent inference from the evidence adduced that touched upon appellant, it is still impossible to bridge the gap between facts proven and the proof required to establish her guilt of a conspiracy count.

To refuse to accept that the evidence proved that Errion "controlled" appellant is simply to assert that the evidence proved only that she played this role and to insist that whether she did so as an innocent dupe or a knowing accomplice are conclusions, either of which may still be drawn as one sees fit.

That is to say, as to which one guess is as good as another.

In the final analysis the Grand Jury concluded that appellant had not criminally participated in the substantive offenses. Under the law of conspiracy, therefore, she is equally innocent of having participated in any conspiracy to effect them. Nor did the Grand Jury actually intend to charge her with any such facts. It intended to charge her with association with Errion at this time, the man being a scoundrel who had likewise practiced deceits upon others in the past, leaving it to a petit jury to determine whether or not she

should be censured for doing so. There was no question but that she was actually innocent of any knowledge of his *scheme*. It was what she should have known about the *man* (despite her age, sex and the trappings with which he surrounded himself and his great charm and persuasive powers), in view of the particular past deceits he had practiced upon her. These included, of course, convincing her of his innocence of past deceits upon others to her monetary loss.

This is no crime and therefore the indictment states no crime. But in the meantime, who dare have the temerity to assert that even upon this basis appellant warrants censure instead of sympathy? Certainly no one who pauses to consider the matter well. Errion was a bold and fantastic swindler because he had victims who were boldly and fantastically gulled. His powers of deception are to be measured by the extent to which his victims were deceived. Appellant was not alone in being deceived. When the evidence is consistent with appellant having been in fact deceived, at what point can one assert, "This is too much; beyond this point she should not have been deceived."

Birds of a feather may flock together, but among those that flock around the swindler are those that he has attracted there to be plucked.

Appellant was a badly deceived, badly imposed upon, elderly woman whose judgment was warped by the wiles of a swindler who deceived a great many other persons, many with minds far younger and sharper than her own.

But as greatly as Errion abused her, one can picture the terror and confusion, the physical and mental hardship, that appellant must have endured in this trial, at her age and with her past background, where she was charged with nothing and could defend against nothing?

ASSIGNMENT OF ERROR NO. V

The Court erred in informing the jury that the defendant Errion had pleaded guilty.

POINTS AND AUTHORITIES

I.

It was error for the Court to inform the jury that the defendant Errion had pleaded guilty.

Nigro v. U. S., 117 Fed. 2d 624.

Walker v. U. S., 93 Fed. 2d 383, 395.

ARGUMENT

The cause, of course, started right out revolving around the defendant Errion.

On the afternoon of the third day, the Court stated as follows (Tr. p. 493):

“We are not going to try Mr. Errion here any longer. He has pleaded guilty. He is safely in jail. I think that we have all we can do to try the other six defendants that are here without discussing Mr. Errion any further.”

The occasion was the recall of the witness Vai by counsel for the defendant Wright to elicit from him an

occasion when Errion had commented upon persons who had fled from the territory of the United States to escape extradition (Tr. p. 493). This was relative to the defendant Wright's defense that his return of the \$290,000.00 to the Mt. Hood account was proof of his innocence of having partaken of any scheme of Errion's.

A few moments after the foregoing statement, the Court stated as follows (Tr. p. 494):

"Ladies and Gentlemen, I want to make one thing clear to you, as I will in the instructions: These people that are on trial, these seven defendants are the only ones on trial. They are the only ones on trial, and you will be called upon to determine the guilt or innocence of these seven persons and no other persons. Mr. Errion is not involved in this case. I mean you will not have to determine whether Mr. Errion is guilty or not guilty. He has already pleaded guilty. The same is true of Mr. Montgomery. You might like the United States Attorney, or you might not like him, and the same is true of any of the Government officials, the Securities and Exchange Commission representative, or the Post Office representative, or any of these witnesses who have appeared here. Perhaps they have been guilty of a crime; perhaps they should have been indicted, but you do not have to determine whether they should have been indicted or whether they are good people or bad people, only to the extent that their credibility may have been affected by something which they did or did not do, and that is why I have permitted wide discretion on the part of the attorneys in interrogating some of these witnesses; not for the purpose of determining whether they are guilty or not guilty of a crime or whether they are good people or bad people, except in so far as the type of person the witness is determines how much credence you may

put in the statements which that person has made.
“Do I make myself clear on that?”

The latter part of this statement was occasioned by the fact that in many instances it was impossible to make a factual distinction between witnesses for the prosecution and some of the accused. In some instances it seemed as if the role a witness had played could be directly compared with the role of a particular accused. In others, it seemed as if the witness had behaved in a far more reprehensible fashion. In all instances (except for the mere formal witnesses) they too, had been deceived by Errion into furthering his scheme by whatever their participation had been.

As the cause progressed, it was impossible for anyone to adhere to the admonishment of the Court relative to not trying the defendant Errion. The facts did not permit the prosecution to depart from this course.

The Court's announcement was clearly prejudicial. Both fraud and conspiracy were thereafter facts that conclusively existed.

The announcement was particularly onerous upon appellant. Her sole involvement under the allegations of fact was whether Errion had perpetrated a fraud and had used her services in doing so. The Court did not inform the jury that in fact Errion had pleaded guilty to two substantive counts, II and IX, and Montgomery to one, the conspiracy count, nor does this record anywhere reveal these facts. As far as this record and this announcement goes—both had pleaded guilty to all counts, including conspiracy. A conspiracy existed

(two having pleaded guilty to it) and under the theory of the indictment, i.e., if the allegations of the substantive counts (against Errion) were true, appellant could be convicted of the conspiracy count, appellant's conviction became a foregone conclusion.

The possibility that it would be faced with a trial revolving around a man not even present in the courtroom (because he might plead guilty) was a difficulty the Government invited by this mass indictment. This was not choice of the accused, and appellant in particular moved for a separate trial.

In instructing the jury, the Court stated as follows (Tr. p. 1750):

"As I told you at the commencement of this trial, Edgar Robert Errion and Roland L. Montgomery have entered pleas of guilty to certain counts in the indictment. The fact that they entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the indictments, nor does it necessarily mean that each or any of the other defendants is guilty with them. In fact, it is no evidence of their guilt or innocence or that a crime was committed. (That is, the pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed.) The guilt or innocence of the defendants who are on trial must be determined by you solely by the evidence introduced at this trial."

Under the indictment in this cause, it was impossible to cure the prejudice to appellant occasioned by the jury having been informed that the man whose convenience she had served had acknowledged by pleading guilty that he had been engaged in the perpetration of

a fraud and that he had headed a conspiracy to defraud. There was no denying what she had done, nor was it an apparent unlawful act in itself; the "issue" was only its ultimate effect, i.e., what Errion was doing when he had her do it.

ASSIGNMENT OF ERROR NO. VI

The Court erred in denying appellant's motion for a judgment of acquittal.

ARGUMENT

Appellant makes this formal Assignment of Error that the Court erred in overruling her motion for a judgment of acquittal. The same was erroneous upon the propriety of the Assignments of Error urged herein and set forth in said motion as the grounds thereof.

SUMMARY

This cause contains no indictment of appellant for conspiracy, but it does contain an indictment, and the most severe indictment possible, of the indiscriminate use of the conspiracy count, and of the practice of crowning a series of substantive counts with a conspiracy count that does no more than allege a conclusion of law and incorporate by reference the allegations of the substantive counts.

The practice creates the impression that the crime is merely a legal fiction and completely synthetic. Here,

matters got so far out of hand that it could not be recognized that appellant was being convicted upon evidence of innocence and without any issue whatsoever of personal guilt having been set forth in the indictment or being tried in the cause.

Respectfully submitted,

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Attorney for Appellant.

APPENDIX

This record in this cause is primarily concerned with the defendant Edgar Robert Errion. And this despite the fact that he pleaded guilty (to two substantive counts although the jury was only informed that he "had pleaded guilty"; Tr. p. 493) and did not stand trial; nor was he called to testify.

He emerges from the record as the principal malefactor; a bold swindler who initiated and engineered the promotion of a plywood cooperative of some 550 members at \$1,000.00 per membership, as a fraudulent scheme from which he intended to benefit.

He was nominally a resident of Salem, Oregon, where he lived the life of a gentleman farmer in a suburb of that community (Tr. p. 168), oft-times referring to himself as a retired Army officer (Tr. p. 512). The record reveals that he is possessed of an utterly fantastic personality. He had the imagination and desire to conceive this half-million dollar fraud, coupled with an ability to charm (Tr. pp. 1399 et seq.), to generate enthusiasm (Tr. pp. 1263-64), and to inspire confidence and faith in his credibility far beyond reason. As early as page 439 of this Transcript of some 1850 pages, the trial court observes that there is no further need of any questions concerning his persuasive powers.

It is difficult to follow some of the more dizzying convolutions of his plot. He could lie; drop names; surround himself with legitimate personalities including

the most prominent of counsel, and seemingly at times, conduct himself as if he himself believed in his fabrications as reality.

In 1941 he promoted an oyster bed cooperative in Coos Bay, Oregon, that left behind it a trail of civil actions for fraud (Tr. p. 1087). In 1953, the year before this venture, he started two other plywood cooperatives, the Beaver at Salem (Tr. p. 1088) and the National at Independence, Oregon (Tr. p. 518). These were halted by an injunction of the S.E.C. (Tr. p. 1518). In addition he was at some time, apparently, subjected to criminal prosecution, similar to this one, in which he was acquitted (Tr. p. 1258). None of the accused in the cause at bar were involved in these two cooperatives except the defendants Munkers, who was a party to the injunction (Tr. p. 1092), and Bones, who was a salesman for memberships in the Beaver Cooperative (Tr. p. 1208).

Notwithstanding, at the time this venture began in 1954, although he had achieved a certain amount of notoriety in the Northwest by virtue of the nature of the cases in which he had been involved and the sums of money concerned (Tr. pp. 1525-1526), his poise was obviously not greatly ruffled and correspondingly his activities not greatly hampered.

The program he espoused here was the establishment of a plywood cooperative in the vicinity of Estacada, Oregon, close by the Mt. Hood National Forest. Here vast amounts of Government timber could be harvested and not far distant, within the forest itself,

the Government had laid out a proposed townsite for a forest community to be named Ripplebrook where the members of such a cooperative could build their homes and establish their own community (Tr. pp. 882 et seq.).

The heart of his program, however, was his representation that he had had preliminary negotiations with an "Eastern firm" (Tr. p. 269) (which later became a syndicate of "Texas oil millionaires," Tr. p. 503, including a contact with one P. R. Phillips, of Phillips Petroleum), through which he had obtained assurance of financing for such a project. Because the money for plant construction could be borrowed from this source, the memberships could be sold for a sum far less than usual and only to gather the necessary operating capital.

This was the venture Errion proposed. First he gathered together the incorporators necessary for the incorporation of the cooperative and the separate corporation to sell its memberships (Tr. p. 267). This reached far beyond the accused in this cause. Of the five incorporators for the cooperative, for example, only two, Locke and Williams, were indicted. The others were one Tucker, one Schroeder and one Current (Tr. p. 279). When these incorporations had been accomplished, a sales force came into being and began selling memberships. When the memberships had been sold, the cooperative itself came into existence as organized by its 550 members, and upon its Board of Directors sat a number who were likewise other than any of the accused.

Errion's original representation became the repre-

sentation of the salesmen engaged in the actual selling that the monies for plant construction would be borrowed while the money paid in for memberships would be retained for operating capital. Later, it became the means by which he entered into "negotiations" with the organized cooperative purportedly upon behalf of the financial backers; "negotiations" by which he attempted a grand theft of some \$290,000.00 from the cooperative's treasury.

Errion's representation was proven to be false of his own knowledge by direct evidence.⁸ The real P. R. Phillips of Oklahoma City, Oklahoma, was produced to testify that he had never heard of Errion or his cooperative (Tr. p. 995). In the "negotiations" referred to Errion made use of a letter setting forth the terms of the "backers" and purportedly signed by one "P. R. Phillips." The witness Howard, no Texan and no millionaire, testified that he had signed such a letter at Errion's request and in the presence of only the two of them (Tr. p. 523).

The defendant Locke is a 78 year old retired furnace repair man whose home was likewise in Salem (Tr. p. 1641). He was an incorporator of the cooperative and the separate sales agency established to sell its memberships. Upon the organization of the cooperative by its members, he was elected president. The defendant Bones, aged 69, was a gardner and also a resident of Salem (Tr. p. 1170). He likewise was an incorporator

⁸ At one point he even went further; the witness Vail testified that Errion informed him that there was in fact two million dollars on hand in the form of a letter of credit in a Portland bank (Tr. p. 421).

of the two corporations. After that he sold memberships from an office in the vicinity of the proposed plant site. He had also sold memberships in the Beaver cooperative (Tr. p. 1208), but, on the other hand, he bought some of Errion's oyster beds (Tr. p. 1318). The evidence revealed that prior to the events concerned here, Errion had involved these men in his tangled affairs (occasioned by the lawsuits against him) by borrowing sums of money from them (Tr. pp. 729-1373) (as well as appellant (Tr. p. 1423),) and creating a corporation to hold his property in which these two men were officers and held stock as security, etc. (Tr. pp. 606-1718).

The defendant Williams was a lieutenant in the Oregon State Police (Tr. p. 1391), whom Errion met about this time as a casual acquaintance (Tr. p. 1393). Errion cultivated him until he likewise became an incorporator of these two corporations and his son-in-law, the witness Samuels, the secretary of the cooperative during its membership sales period (Tr. pp. 1393 et seq.).

These men, together with Tucker, Schroeder, Current and one Buhl and one Kelly and one Ray Lock likewise became incorporators of various other corporations conceived by Errion to add to the cooperative's attractive features by separate cooperatives to buy its timber and to sell its finished products at an advantage to the membership (Tr. pp. 280, 282).

Wright is 43. He is the nephew of the defendant Munkers (Tr. p. 1252), and, while he had been introduced to the defendant Errion by his uncle at an earlier

time, he had not before been involved in any transaction with him. Errion made him manager of the sales agency (Tr. p. 1266) and subsequently, for a period of time, he was general manager of the cooperative after it was organized by its members (Tr. p. 1345).

Montgomery and Martin were salesmen for the sales agency. The defendant Montgomery pleaded guilty to the conspiracy count (although again the jury was only informed that he had "pleaded guilty"; Tr. p. 494), for reasons that are a complete mystery in so far as the record is concerned, since the record, with ample opportunity, in no wise particularly connects him with Errion or with the stratagem directly employed by Errion to get the cooperative's money into his pocket. The defendant Martin was the only accused acquitted.

The defendant Munkers is in a different position than any of the others. He was an earlier acquaintance of the defendant Errion and had been involved in the oyster bed promotion with him (Tr. p. 1049). He first appears as being placed upon the payroll of the organized cooperative as a "financial engineer" (Tr. p. 120) upon the recommendation of Errion (Tr. p. 1307). He was involved in both of Errion's prior cooperative ventures of 1953 (Tr. p. 515). The witness Snyder, an officer and director of the organized cooperative, testified that during the purported "negotiations" Errion introduced the defendant Munkers to him as a representative of the purported financial backers (Tr. p. 35). In addition the witness Jack, counsel for the cooperative, testified that Munkers introduced himself to him as the "contact" man of the financial backers (Tr. p. 755).

Appellant, of course, was only used by Errion in the fashion indicated by the allegations of the indictment concerning the Davenport Corporation. Since this was all with which the prosecution's case was concerned, how Errion induced her to serve his convenience in this fashion was left to her own testimony and will be dealt with in like fashion here.

The pathway by which Errion profited was simple. At the inception of the cooperative when he had counsel (the witness Bobbitt) draw the Articles of Incorporation for the cooperative and the separate corporation to sell the memberships, he had counsel draw a contract granting him ten per cent of the sales price of the memberships in return for services to be performed by him (1) as promoter, (2) in locating and purchasing a plant site for the cooperative, and (3) in obtaining financing for the project (Ex. 6). This is the contract referred to in the indictment that was "caused to be executed" in the name of the Davenport Corporation. It was signed by the witness Samuels and the defendant Williams upon behalf of the cooperative (Tr. p. 188) and appellant upon behalf of the Davenport Corporation. Through it Errion obtained ten per cent of the sales price of the memberships as they were sold, and after the organization of the cooperative, purchased upon its behalf its plant site. The cooperative paid \$58,500.00 for this land, but it was purchased from its owners for some \$25,000.00 less, Errion pocketing the difference.

He was in the middle of a grand theft of some \$290,000.00 from the cooperative's treasury through the "financing" of the project when ostensibly by the act

of the defendant Wright, his plan was thwarted and his machinations revealed.

* * *

It seems patent that the prosecution proved that the fraudulent scheme was Errion's; and not by implication. Witness after witness for the Government put it in the direct words; "This plan was Errion's" (Vai, Tr. p. 412; Bobbitt, Tr. p. 266; Samuels, Tr. p. 168). The falsehood that went to the heart of the matter would appear to be his representation of a personal contact that assured financing that he alone professed to have and that he set afoot before each of the other accused became actively connected with the venture. There can be added to this that if the evidence purports to trace his promotional fee or the profit he made upon the plant site beyond him, it is by speculation only. There was equally no evidence that he was going to share with any one the large sum he was trying to get his hands upon when his plans collapsed. He did owe appellant, as well as Locke and Bones, considerable sums of money which he had extracted from them prior to this occasion and he did pay some of this back during the course of this transaction.

There was no real attempt by the prosecution, however, to controvert the creditor-debtor relationship testified to by the witness Piatt (Tr. p. 637), and these defendants, as the cause of these payments.

Further, his representation of an assurance of financing does in fact go to the heart of the representations alleged in the indictment. Those submitted to the jury

were as follows: (1) That members were assured job security in a plant to be constructed at Estacada, Oregon. (2) That finances had been arranged for the construction of this plant, (3) That the members' own money would be retained as operating capital and (4) That the General Timber Cooperative had large tracts of timber it would sell to such a cooperative at market price (Tr. p. 1761).

In submitting the substantive counts to the jury the trial court instructed upon the customary rules of fraud and no differently than if the accused in those counts were individually standing trial. The jury was instructed that a representation made without regard to whether it was true or false can be fraudulent (Tr. p. 1766). They were likewise instructed that to find any particular defendant guilty of any substantive count, they need only find that he made one (or more) of the foregoing misrepresentations under the foregoing circumstances (Tr. p. 1778).

The testimony of the witnesses Howard and Phillips was direct evidence that the defendant Errion knew of his own knowledge that the first three of the foregoing representations were false. The testimony of the witnesses Jack and Snyder is like evidence of the same fact as to the defendant Munkers. As appellant reads the record, however, there does not appear to be like evidence as to any other defendant.

It likewise appears that direct evidence that Errion knew his program was a fraud must have been material to the prosecution's case against the other defendants or

else these witnesses would not have been produced since Errion was not on trial. Their testimony proved that any statements concerning the cooperative—that its financing was assured, that a plant would be built, etc., were in fact false. From this fact, coupled with the foregoing instructions, appellant concludes that the case against appellant's co-defendants was that of their individual, and not joint, liability based upon statements shown to be in fact false, giving rise to a permissible inference that they were made without any basis.

The General Timber Cooperative came into being as a separate corporation that would be used to purchase the timber needed by the plywood plant for resale to the cooperative and at an advantage to the latter and apparently only to make the program as a whole more attractive (Tr. p. 281). It does not seem to have been organized for the purpose of holding it out as a holder of timber already purchased. Its incorporators included the unindicted Buol, Kelly and Ray Lock as well as the defendants Locke and Williams (Tr. p. 282). That it was held out to be the holder of timber seems to be a representation that first appears in the testimony of the witness Orell, a member, who testified that the defendant Bones stated the same to him in inducing his purchase (Tr. p. 368). It would seem probable, therefore, that the responsibility of the others for this representation of the defendant Bones would have to rest upon whether or not other facts proved him to be their co-conspirator.

If the conspiracy agreement intended to be alleged

by the conspiracy count, involved, under the evidence, sharing with Errion actual knowledge of his fraud and how he intended to capitalize upon it, then there is abundant indicia appropriately summed up by the instructions referred to, which were not abstract, that no such agreement ever existed. It may well be that the true status of the conspiracy count is that for lack of direct evidence of actual knowledge and for the inability of circumstantial evidence, no matter how strong, to ever preclude the hypothesis of actual ignorance, the facts in this case did not warrant submission of the conspiracy count as to any other than the defendant Munkers.

* * *

The evidence adduced to prove the allegations of the substantive counts concerning the control and use of the Davenport Corporation by the defendants charged therein is the sole evidence that touched upon appellant and is therefore the evidence that is of prime concern to her.

It can be characterized as merely evidence in the trial of her co-defendants for their crimes that happens to mention her.

Proof of the allegations that the defendants therein (actually Errion) caused a contract between the cooperative and the Davenport Corporation to be executed by means of which a large portion of money paid in for memberships was diverted to those defendants' (again actually Errion's) use is found in the testimony of the prosecution's witnesses Bobbitt, Milkes, Samuels and Piatt.

The witness Bobbitt, counsel of the highest integrity and repute and a former agent of the Federal Bureau of Investigation, testified that during this time he never met appellant (Tr. p. 293). He had no discussions with her (Tr. p. 301). He was hired by Errion to do the legal work (Tr. p. 277). His initial and principal contact was with the defendant Errion (Tr. p. 266; Overt Act No. 2, Count XIII). Pursuant to consultations with Errion and sometimes with members of the subsequently formed Board of Directors of the cooperative (including others than those indicted), he drew Articles of Incorporation for the cooperative (Tr. p. 274) and a separate corporation (the Forest Products Cooperative) that was to be the sales agency for the cooperative's memberships (Tr. p. 296). Upon order of Errion (Tr. p. 306) he drew a contract between the cooperative and the latter agency giving the latter ten per cent of the sales price of the memberships for his effort in selling the same and another contract between the cooperative and the Davenport Corporation, calling for the payment of a second ten per cent for services (1) as a promotional organizer, (a role only Errion was playing); (2) for locating and purchasing a plant site (the second avenue by which Errion intended to profit) and (3) for obtaining and perfecting the cooperative's financing. (No one but Errion had the fortunate contact with the "Eastern financiers" or the "Texas oil money.")

From the beginning the witness Bobbitt had understood that Errion would be concerned in aiding the establishment of the cooperative and its financing (Tr. p. 269).

To continue its proof that the contract between the cooperative and the Davenport Corporation was in reality that of the defendants charged under the substantive counts (in fact Errion) and the payments it provided for theirs (Errion's), the prosecution produced the witness Samuels. The witness Samuels was the first treasurer of the cooperative during its promotional period (Tr. p. 150). He testified that he was hired by Errion (Tr. p. 151) and that he wrote the checks during this period (Tr. p. 152). From the sales agency he received the sums paid for the memberships less ten per cent (Tr. p. 154); to Errion he paid the latter his ten per cent. The checks were made out to the Davenport Corporation but delivered to Errion personally (Tr. p. 157). Errion had always been Johnny-on-the-spot, with his hand out, to receive the ten per cent called for by this contract (Tr. p. 158). The witness Samuels had had no discussion with appellant over the matter (Tr. p. 160). The last he saw of these checks was as they "went into Mr. Errion's pockets" (Tr. p. 182).

The witness Samuels likewise testified that he and his father-in-law, the defendant Williams, had executed the contract with the Davenport Corporation upon the behalf of the corporation, as its President and Secretary, under circumstances showing fully their understanding that it was Errion's contract (Tr. p. 188). "All of the planning came from Mr. Errion" (Tr. p. 168). "He did the promising" (Tr. p. 200).

Earlier the witness Milkes, a certified public accountant retained by the defendant Wright identified by checks by which these payments had been made.

The contract and checks being in the name of the Davenport Corporation, in logical sequence, the prosecution established that there was checking account in that name into which these checks were deposited and that the account was in reality Errion's.

The evidence concerning this account was adduced through the prosecution's witness Piatt. She stated directly that the account was Errion's (Tr. p. 581).

She testified that she had known appellant for many years (Tr. p. 566). In December, 1954, she was working in Ashland, Oregon, when appellant contacted her and asked if she would be interested in employment as Errion's secretary. In March of 1955 she accepted the employment directly from Errion (Tr. p. 586).

A major portion of her job was handling Errion's money. She identified the checkbook for this account and stated that the checks it contained that were written prior to her employment were in appellant's handwriting (Tr. p. 584).

She testified that she had understood from both appellant and Errion that this account contained only Errion's money; that it had been used by Errion since the inception of his promotion of the cooperative and that appellant had merely been writing his checks for him (Tr. pp. 569, 570, 581). Upon her employment the checkbook was turned over to her and her signature authorized to make withdrawals at the bank (Tr. p. 568). Thereafter, she generally carried Errion's money around in the form of cashier's checks until she wished to draw a check, then made such deposit as was neces-

sary for that purpose (Tr. p. 570). At one point she was carrying some \$34,000.00 (Tr. p. 575). Ultimately, under Errion's direction the account was closed by simply allowing it to remain dormant with the sum of \$3.50 in it (Tr. p. 586).

So much for those allegations that concerned the defendants' charged under the substantive counts use of the Davenport Corporation as a means by which they had drawn off a substantial portion of the moneys paid in for memberships.

The prosecution next turned to proving the allegations of the substantive counts that the defendants, again actually Errion, had caused Mt. Hood's own agents, employees and officers to procure options upon property for a plant site in the name of the Davenport Corporation, had then taken funds from Mt. Hood to purchase it in the name of the Davenport Corporation and had then resold the land to the cooperative at a large profit to themselves and the corporation they controlled.

The transaction concerned two tracts of land and the ultimate purchases were handled in escrow (Tr. p. 1077-1078). However, one deed to both pieces from the Davenport Corporation to the cooperative was introduced and it bore the signature of appellant as president and one I. H. Phillips as secretary (Ex. 141). How and when appellant executed the same was left to her own testimony.

The options to purchase this land were taken during the membership selling stage. One owner, the witness Posey, testified that he dealt with the defendant Munk-

ers (Tr. p. 906) and gave him an option to purchase for a price of \$14,000.00 running to the Davenport Corporation. As to the other piece, the witness Banks testified that he was a resident of Salem who had known Mr. Locke for many years; that he had been hired after an interview with the defendant Williams and Errion to be a future "secretary-manager" of a sawmill and glue line plant (Tr. p. 917). He was thereafter asked to take part in the negotiation for the plant site. He located the second piece owned by the witness Alspaugh and was then instructed by Errion to take an option to purchase it in the name of the Davenport Corporation (Errion's explanation: "It would aid in the financing;" Tr. p. 920). The price was \$19,000.00 together with the \$500.00 of his own money he paid for the option. He was later reimbursed by check of the Davenport Corporation delivered to him by Errion (Tr. p. 922).

The witness Current then testified that he was a member of the Board of Directors of the cooperative and identified two records of minutes. The first showed that on motion of C. Schroeder seconded by W. Kelly, a check was made out to the Davenport Corporation for \$31,500.00 to apply on the purchase of 90 acres of land in Estacada (Tr. p. 932). The second showed that at a subsequent meeting upon motion by C. Schroeder seconded by W. W. Locke a check was issued for the balance due upon the land at Estacada in the amount of \$27,000.00 (Tr. p. 933).

Nothing shrieked more of appellant's innocence in this matter than the testimony of the defendant Munk-

ers who started out by stating that his instructions concerning the purchase he made came from appellant and that he had had no dealings with Errion concerning it (Tr. p. 1035). On cross-examination he tried to exhibit that he had no understanding that the options when taken were for the purpose of obtaining a plant site for the cooperative (Tr. p. 1085). Upon instruction of Errion, he billed the Davenport Corporation for the sum of \$18,000.00 for services rendered for this and other dealings with and for Errion, delivering the bill, of course, to Errion (Tr. p. 1107). However, he received no payment (Tr. p. 1136).

* * *

Other portions of the testimony touching upon the defendants' relationship to appellant were as follows:

It was established that the house in which appellant lived is situated on the main street of a suburban business district in the City of Portland and that it had office space attached to it on the sidewalk level which was occupied by the sales agency that sold the memberships, and, after its organization, by the cooperative itself for a short period of time (Tr. p. 836). A reasonable rent was paid appellant for this occupancy (Tr. p. 134-848).

When printed copies of the prospectus and by-laws of the cooperative circulated among perspective members were introduced, it could be seen that they bore upon the base of their title page the imprint of having been copyrighted by the Davenport Corporation (Ex. 28, 30).

There was likewise a contract by which the Davenport Insurance Agency was to procure such insurance as would be required by the cooperative and one of the committees created by the members themselves after their organization was for the formation of a possible group plan for the purchase of individual insurance of various kinds. This committee circularized the members for its interest in such a proposal, stating that such a plan would be put into effect through the aid of the Davenport Insurance Agency. There was no evidence adduced that appellant could have in any way profited through such a transaction other than as a legitimate insurance agent and then only if the cooperative itself were a legitimate enterprise with a continuity contemplated for its membership.

Appellant's testimony in her own defense was, of course, simply that of another witness for the prosecution offering further evidence in support of the allegations of fact of the substantive counts against the defendants charged therein. For herself, she could only add the details that gave coherence to the evidence from which it had already been concluded that she had not criminally participated in the substantive counts.

She had known Errion for many years. When she and her husband had been engaged in the insurance business, he had upon occasion occupied office space in their office (Tr. p. 1423). Over the years he had borrowed moneys from them that he had never repaid; at the time of trial, his debt totaled \$40,000.00 (Tr. p. 1423).

The office space attached to appellant's home had been first rented to Errion by her husband during his lifetime for use by Errion and two other associates (not indicted) working with him in authoring the prospectus and by-laws for a plywood cooperative. From one of these men, one Murray, she learned they were working under the advice of three different attorneys; Bobbitt and one Goldsmith and one Bailey (Tr. p. 1425).⁹

The Davenport Corporation had been created by herself and her husband a number of years past to hold investments (Tr. p. 1423). After her husband's death Errion had come to her and had asked for permission to put his contract in the name of the Davenport Corporation. He explained that he had a contract for ten per cent for his organizational work made with the consent of all the members that were organizing it (Tr. p. 1426). He told her of his associates, Mr. Williams of the State Police, Mr. Kelley, the architect, etc. (Tr. p. 1426 et seq.). He explained how it was all being handled by attorneys, etc. However, he could not take the contract in his own name because of the judgments against him although the judgments had been paid off. They had not been dismissed because the persons who had paid them off, including appellant and her husband, had not yet been repaid their moneys. As soon as he did this, he could then handle the transaction in his own name. In the meantime the Davenport Corporation was licensed to do business in estates and properties and to

⁹ The latter two also respected members of the Oregon Bar and known for their ability in corporate work.

handle the moneys of other people etc. He had finally convinced her that this was to be "a very fine industry in which he was associated with wonderful people" and that all she would have to do would be to open a special bank account in the name of the Davenport Corporation upon his behalf and handle his moneys for him under his direction for a short period of time (Tr. p. 1428). (It was because the matter stretched on that she had contacted the witness Piatt to see if she was interested in employment.)

Thus the bank account was established for Errion's use. It was a new account, opened just for this purpose with \$45.00 of appellant's money (Tr. p. 1432), which she later withdrew (Tr. p. 1433).

The proceeds of all checks to the Davenport Corporation went to Errion. Their usual custom was for the two of them to take them directly to the bank where she endorsed them and exchanged them for cashier's checks which in turn she immediately endorsed and delivered to Errion (Tr. p. 1444).

None of the moneys from the cooperative or deposited in this account or withdrawn from it, belonged to or went either to the Davenport Corporation or herself (Tr. p. 1445), with this exception: She volunteered that Errion did repay her the sum of \$2500.00 upon his prior debt to her (Tr. p. 1460) by returning to her one check from the cooperative in that sum.

Appellant likewise volunteered that Errion promised to pay her ten per cent of the moneys passing through the account for being his "checkwriter" (Tr. p. 1426).

She testified, however, that she never received this or any other moneys from him other than the payment of \$2500.00 upon her debt.

There was no evidence introduced to increase this amount or to contradict that the legitimate creditor-debtor-relationship existed between herself and Errion when it was paid and that this was the nature and cause of the payment.

As to the purchase of the plant site, Errion had asked her if the options could be taken in the name of the Davenport Corporation to avoid the owners' raising their price to the cooperative which they might do if they knew it was the buyer (Tr. p. 1467). Likewise, he played upon her vanity by explaining how she had had a great deal of experience in real estate matters and that he thought it would all be done right if she handled it (Tr. p. 1467). She wrote such checks as were required for the options (Tr. p. 1470) and deposited in the Davenport Corporation account for Errion the checks received (Tr. p. 1471). The transaction was handled in escrow and she executed the deed with the consolidated description to the cooperative (Tr. p. 1471). No details of price were discussed with her, and she received none of the money (Tr. p. 1471).

Her cross-examination was vigorous. Everything the prosecution had proven in its case in chief in support of the allegations of fact of the substantive count against appellant's co-defendants was repeated now for whatever suspicion it might cast upon appellant. Counsel for the government argued with her; how could one tell the

difference between the check for \$2500.00 whose proceeds she acknowledges as having received—and the other checks in the same form that she stated she endorsed over to Errion (Tr. p. 1510)? Could she not add and subtract so as to be aware of the fact that \$25,000.00 remained in the corporation's account after the plant site transaction (Tr. p. 1514)?

The arithmetical calculations made possible by the witness Piatt's testimony, showing that every cent went to Errion, were ignored.

In appellant's own testimony, for example, she had stated that one check of the Davenport Corporation account had the following explanation: From Redding, California, Errion had contacted her requesting her to transfer \$10,000.00 from the corporation's account to a bank in that community to enable him to make an advantageous timber purchase. Appellant had transferred the sum to a bank in that community but had refused to execute an authorization that would permit the defendant Errion to draw upon the same (Tr. p. 1463); subsequently, she had authorized a withdrawal of the money by her nephew, a resident of San Francisco, California, whom she learned was unexplainably then in Errion's company's, permitting him to buy the land (Tr. p. 1464).

This was gone over as if to establish dominance over the moneys in this account by appellant (and as if the prosecution had not taken up page after page of the record to establish, as alleged, that it was Errion's account and dominated by him) or, if not that, then a

distrust of Errion upon appellant's part from which her knowledge that he was a scoundrel could be inferred (Tr. p. 1500 et seq.).

She argued right back with counsel for Government that there was, of course, nothing inconsistent in her refusal to permit Errion to make the withdrawal with a desire upon her part to keep the relationship between them upon the plane of his promise to pay her a portion of the moneys he owed her from his supposedly legitimate earnings.

* * *

Appellant will now sketch in briefly the course of Errion's scheme:

What his programs were for the Beaver and National Plywood Cooperatives the record does not reveal, but his program here consisted of the following:

Within the periphery of the Mt. Hood National Forest, and sometime prior to the events to be related, the United States Government had laid out a proposed townsite for a forest community to be named Ripplebrook (Tr. pp. 27-882). In the spring of 1954 Errion gathered about him for a picnic in this area, the witness Bobbitt (Tr. p. 266), an architect by the name of Kelley (an architect of apparent competence in the industrial field being reputed by the testimony to be one of the architects for the Ford Dearborn plant), the defendants Wright, Munkers, Williams and Locke (Tr. p. 272), the wives of some of these men (Tr. p. 1029) and others, upon all of whom he had done some earlier "spade work" (see the testimony of the witness Bobbitt).

Standing upon this ground (Tr. pp. 1263-1264), Errion imbued his guests with enthusiasm for a cooperative whose memberships could be sold at a nominal sum because of preliminary negotiations he had already had with financiers with whom he had had contact (dropping the name of one Guy Myers) and which could build its plant in this area where its members could build their own community and where vast amounts of National Forest timber could be harvested (Tr. p. 1032). It was a glowing picture of a highly feasible project as the witness Bobbitt testified (Tr. p. 295).

Nothing was too small to be seized upon for versimilitude by Errion. On a trip to Ripplebrook with Wright, Munkers, Williams and Vai, they were passed by an impressive Cadillac automobile. Errion casually observed that the Texas people planned to send someone to investigate the area and that he thought that "was them going by now" (Tr. p. 437).

The enthusiasm engendered at this picnic was moved along and Articles of Incorporation were drawn by the witness Bobbitt.

The defendant Wright was the nephew of the defendant Munkers. At this time he had an automobile agency in the town of Redding, California. He had met Errion, supposedly a man moving in the higher circles of finance, through his uncle. On one of his trips to Portland, in the company of the latter, he had gone to the home of the architect Kelley where there had been a group discussing the program for a cooperative (Tr. p. 1258). Then he went on the picnic described

above (Tr. p. 1261) and this was followed by a proposal from Errion that he become sales manager for the sales agency to be established (Tr. p. 1266). Returning to Redding, Wright discussed the matter with the witness Vai, manager of the local bank in that city (Tr. p. 425). He gave him the name of Myers, dropped by Errion, and asked him to inquire through banking circles concerning him (Tr. p. 431). Vai did so and reported to him that there was no doubt whatever of the authenticity of this man or of his ability to engage in such a venture (Tr. p. 432). Returning to Portland, Wright accepted the post. (First, however, he sold memberships for a short period of time in the "Mt. Shasta Cooperative" in California, which barely got started when it ran into difficulties of California law. "Murray" was apparently heading the sales office of Mt. Hood at that time.)

As might be expected, the relatively low price made the sale of memberships easy. A membership in a cooperative is an ownership interest. They were sold upon the basis of the obvious benefits of such an interest, such as job security, together with the representation that their low purchase price was made possible by the plan to obtain outside capital for plant construction; the accompanying representation being that the monies received from the sale of memberships could thus be retained for operating capital. This was Errion's assurance set afoot as early as the picnic referred to and now spread directly to the prospective members, first by Murray and then by Wright, through the sales force.

The initial program called for a membership of 300.

When this number had been sold, Errion proposed a membership of 500, then 550.

When 550 memberships had been sold, the sale was closed and the members held a general meeting at which they elected their officers and directors and ostensibly took over management of the cooperative's affairs. The witness Jack became counsel and numerous committees were appointed from among the membership to take the steps necessary for actual operation. The witness Vai had already been hired as general manager by Errion (Tr. p. 408), a contact made for Vai by the defendant Wright. The witness Tucker was hired as plant superintendent (Tr. p. 773). The V. Prentice Company, industrial engineers, were consulted and drew plans for plant construction (Tr. p. 799). The plant site was purchased in the fashion heretofore detailed.

With the purchase of the site, pressure began to mount upon Errion to produce the expected capital for construction of the plant.

At about this time the Securities and Exchange Commission began investigating Errion's activities in this cooperative. In doing so it created considerable unrest (Tr. p. 1310). There was dissension between the cooperative and the Commission over the conduct of this investigation. The cooperative maintained that Errion had no direct voice in the management of its affairs. (And, indeed, at this time he did not.) Under the guidance of the witness Jack, who associated with him other counsel of prominence for the purpose, the cooperative brought suit against the Commission upon this

basis to restrain the Commission's representatives who were investigating it from hampering its activities (Tr. p. 978). The suit was subsequently dismissed.

The witness Jack was, however, of the opinion that the sale of memberships might have violated the Oregon Blue Sky Laws (Tr. p. 767). Under his direction each member was given the opportunity to withdraw and to obtain a refund of their money at six per cent interest pursuant to Oregon statute (Tr. p. 767). Some accepted, many did not (Tr. p. 101).

Relationship with the S.E.C. boiled down to a demand by that agency of information as to how the plant was to be financed. There was partial assurance that its investigation would cease if it was given adequate proof of the availability of financing (Tr. p. 752).

By this time, Errion, having failed to keep up the payments on a fraud judgment for which there could be body arrest, had fled to Vancouver, Washington to avoid the same. Notwithstanding, he was apparently able to explain this judgment and his flight to another state so plausibly that reputable representatives of the cooperative still met with him in an attempt to negotiate for the expected capital (Tr. p. 769).

Turning these negotiations to his own advantage, Errion engineered what was to be his final coup. Acting with Munkers as a purported mediary to the cooperative for the syndicate of his now "Texas oil men," he gave as a condition to their lending the necessary \$4 or \$5 million dollars, the establishment by the cooperative of a

new and separate corporation to which the majority of the cooperative's money would be transferred. This corporation would in turn use this money to buy the first bonds to be issued by the syndicate to show its "good faith" (or some such) (Tr. p. 65-761). Negotiations as to precise terms was carried on. The witness Snyder, an officer and director, consulted with Errion and reported back to the other officers and directors (Tr. p. 41). The witness Jack was kept busy attempting to put into instruments to be executed the terms being agreed upon.

To put these conditions and terms in writing, Errion took a to-whom-it-may-concern letter, setting them forth and ready for the signature of one purportedly signing upon behalf of the syndicate, to the witness Howard. This letter was written upon a blank sheet of paper without a letterhead.

The witness Howard testified that he was a Christian Science practitioner whom Errion had consulted for treatment (Tr. p. 521). During the course of these visits, Errion had talked of his plan for the working man that was this cooperative (Tr. p. 522). Howard testified that Errion came to him with this letter and had explained that all would be lost if he, Howard, didn't sign it. Believing in the man, the witness Howard had done so (Tr. p. 523).

It was as simple as that; apparently in a single interview Errion prevailed upon this man whose calling speaks of his obvious moral character, to sign a lie dealing with hundreds of thousands of dollars.

From Howard's testimony, however, it is not clear what name he signed. Munkers testified that he had such a letter signed "Howard" for a period of time (Tr. p. 1059), but later he showed a letter to the witness Jack signed "P. R. Phillips" (Tr. p. 756).

The witness Jack had been pressing for assurance as to the financing because of the S.E.C.'s investigation. He was brought to Errion in Vancouver by Wright, and there left alone in the room with the defendant Munkers who stated that he was the contact man for the financial backers and who then showed him this letter as a letter of commitment from the "backers" (Tr. p. 756). Challenged by Jack as to the authenticity of the signature, Munkers stated that he knew the man's signature although he had not seen him sign it (Tr. p. 757).

The next that occurred was revealed by the witness Schulberg (the office secretary of the cooperative; Tr. p. 805). Pursuant to a telephone arrangement by a member of Mr. Jack's firm, she, the defendant Wright and the witness Tucker (hired by the cooperative as plant engineer, Tr. p. 45) called upon the witness Howard Rankin, an attorney, who had ready for them Articles of Incorporation for a corporation to be known as the Clackamas County Building Association for which they were to be the incorporators (Tr. p. 815). These were executed and filed. The parties then met again in Mr. Rankin's office and stock certificates were issued, which each endorsed in blank in his presence (Tr. pp. 778-815). A stockholder's meeting was held and Tucker was elected president, Wright treasurer and Schulberg

secretary. A resolution was passed authorizing a bank account and the signature of the latter two for withdrawals therefrom.

The certificates were then taken by the defendant Wright to the witness Piatt; for delivery to Errion (he thought, Tr. p. 1320). Actually, however, she delivered them to the defendant Munkers (Tr. p. 652). Munkers acknowledged having received them from her, but testified that he didn't know why the witness Piatt had given them to him (Tr. p. 1135).

From the beginning of the purported negotiations with the "Texas oil people" through Errion, the directors of the cooperative and its counsel had been kept advised of the proposal of setting up the separate corporation. As a result, by the time it was actually established, there had already been authorized by the Board of Directors a transfer of \$350,000.00 of the cooperative's funds to it (Tr. p. 61-62). A check in the sum of \$290,000.00 was now drawn by the president, the defendant Locke, and signed by him and the witness Snyder (Tr. p. 23). It was given to the defendant Wright, who, together with the witness Schulberg, went to a bank (in which an account had already been established by the witness Schulberg through a deposit of \$1,000.00 received by her from the witness Piatt; Tr. p. 824) and deposited it (Tr. p. 826). The witness Schulberg testified that she had qualms about this and, according to her, so did the defendant Wright (Tr. p. 828).

The witness Rankin, called to testify by the defendant Wright, testified that he had a call from the defend-

ant Wright telling him of the deposit and that he had then informed Wright that the stock certificates, having been endorsed in blank, put the \$290,000.00 in the control of whoever held them through the simple procedure of a new stockholder's meeting, new officers and a new signature card at the bank (Tr. p. 1165). The witness Schulberg telephoned the witness Jack (Tr. p. 832). The defendant Wright had also seen the witness Jack as well as called the witness Rankin (Tr. p. 1324). The defendant Wright now informed the witness Schulberg that they would withdraw the money from the account of the Clackamas County Building Association and return it to the cooperative's account upon their own (Tr. p. 832). Their original deposit had been upon a Friday and all this occurred over a weekend. Upon Monday morning they went to the bank as soon as it opened, withdrew the \$290,000.00 and re-deposited it in the cooperative's account (Tr. p. 833).

The "negotiations"—and Errion's position with the cooperative—collapsed. The memberships rejected those defendants still with it. At a separate meeting they determined to establish what plant they could with the moneys on hand. A sawmill was constructed, but after a short period of time (Tr. p. 224) the venture failed (Tr. p. 47).

The investigation of the Securities and Exchange Commission continued and terminated with the present indictment. All of the accused were found guilty upon all counts submitted with the exception of the defendant Martin who was acquitted.

No. 15689

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

C. E. LUCKEY
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 7-25-58-40

FILED

AUG - 2 1958

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No. 15689

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

STATEMENT OF JURISDICTION

Appellant was indicted together with eight other persons, namely, Edgar Robert Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, Richard C. Williams and Howard Martin, for conspiracy (18 USC § 371) to commit the crimes of mail fraud (18 USC § 1341) and fraud in the sale of securities (15 USC § 77q(a)). The indictment contained, additionally, seven counts charging mail fraud and five counts charging fraud in the sale of securities against

only seven of the above named defendants, Richard C. Williams and the appellant, Helen A. Davenport, not being included in these twelve counts. Count I (mail fraud) set forth a description of the alleged scheme to defraud, which description was then incorporated by reference in all remaining counts.

Prior to the commencement of trial, defendant Errion pleaded guilty to Counts II (mail fraud) and IX (fraud in the sale of securities) and defendant Montgomery pleaded guilty to Count XIII (conspiracy). Count IV of the indictment was dismissed at the conclusion of the trial. The indictment was dismissed as to defendant Williams during the course of the trial due to his serious illness. Defendant Martin was acquitted of all counts. The remaining defendants were found guilty by the jury on all counts on which they were charged.

Terms of imprisonment were imposed upon the defendants named in this indictment: Munkers 7 years, Errion 6 years, Lock 3 years, Bones 18 months, Wright 15 months, Montgomery 15 months and appellant Davenport one year.

The court has jurisdiction of the instant case under the provisions of 28 USC § 1291.

STATUTES INVOLVED

18 USC § 1341, generally referred to as the Mail Fraud Statute, provides, so far as applicable:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . .”

Section 17(a) of the Securities Act of 1933 (15 USC § 77q(a)) provides:

“It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

- “(1) to employ any device, scheme, or artifice to defraud or
- “(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- “(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”

18 USC § 371, generally referred to as the Conspiracy Statute, provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy,

each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

COUNTER STATEMENT OF THE CASE

Count XIII of the indictment in this case, which was the sole charge against appellant, followed the usual form for such charges:

COUNT XIII.

Conspiracy

18 U.S.C. 371

Prior to March 1, 1954, the exact date being to the grand jurors unknown, and continuing to the date of this indictment, the defendants, Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, Howard Martin, Richard C. Williams, and Helen A. Davenport, in the State and District of Oregon and within the jurisdiction of this court, and at divers other places, did conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:

Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to obtain money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now realleged and incorporated by reference; and

Violations of Section 77q(a), Title 15 U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue

statements and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;

Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of this indictment are here and now realleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of and to effect the objects of said conspiracy; and in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among others, the following, to-wit:

1. On or about July 30, 1954, at Portland, Oregon, defendant Richard C. Williams, as president, signed the Annual Report to the Oregon Corporation Commission for General Timber Cooperative.

2. During September 1954, at Portland, Oregon, defendant Edgar Robert Errion conferred with Attorney Howard Bobbitt in connection with the preparation of articles of incorporation for Mt. Hood Hardboard and Plywood Cooperative.

3. On or about September 24, 1954, at Portland, Oregon, defendants Richard C. Williams, Glenn R. Munkers, Archie L. Bones, and Alan Wright signed articles of incorporation of Forest Products Cooperative Agency.

4. On or about July 29, 1954, at Portland, Oregon, defendants Richard C. Williams and W. W. Lock executed articles of incorporation of Mt. Hood Hardboard and Plywood Cooperative.

5. On or about October 1, 1954, defendants Richard C. Williams, W. W. Lock, and Edgar Robert Errion attended the organization meeting of directors of Mt. Hood Hardboard and Plywood Cooperative at the home of said Richard C. Williams in Milwaukie, Oregon.

6. On or about October 1, 1954, at Milwaukie, Oregon, defendants Edgar Robert Errion and Richard C. Williams presented to and obtained approval of directors of Mt. Hood Hardboard and Plywood Cooperative for a contract between Mt. Hood Hardboard and Plywood Cooperative and The Davenport Corporation.

7. On or about October 1, 1954, at Portland, Oregon, defendant Helen A. Davenport signed a contract as president of The Davenport Corporation with Mt. Hood Hardboard and Plywood Cooperative providing for payment of a fee to The Davenport Corporation of 10% of the total amount received from the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative.

8. On or about October 1, 1954, defendant Richard C. Williams, as President of Mt. Hood Hardboard and Plywood Cooperative, and defendant W. W. Lock, as secretary of Forest Products Cooperative Agency, signed a fiscal agreement, under the terms of which Forest Products Cooperative Agency would receive a 10% commission on all memberships sold in Mt. Hood Hardboard and Plywood Cooperative.

9. On or about November, 1954, at 2045 E. Hawthorne in Portland, Oregon, the defendant Edgar Robert Errion instructed salesmen of Mt. Hood Hardboard and Plywood Cooperative memberships on information to be given prospective purchasers of said memberships.

10. On or about December 6, 1954, at Portland, Oregon, defendant Richard C. Williams received a check for \$1,000.00 from Forest Products Cooperative Agency.

11. On or about November 1954, at Portland, Oregon, defendant Alan Wright hired Joseph B. Gilsdorf as a salesman to sell memberships in Mt. Hood Hardboard and Plywood Cooperative.

12. On or about December 7, 1954, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$8,000.00, and transmitted said check to defendant Helen A. Davenport.

13. On or about November 27, 1954, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$6,500.00, and transmitted said check to defendant Helen A. Davenport.

14. On or about January 13, 1955, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$5,000.00, and transmitted said check to defendant Helen A. Davenport.

15. On or about November 15, 1954, at the home of defendant Richard C. Williams in Milwaukie, Oregon, defendants Glenn R. Munkers, Richard C. Williams, Edgar Robert Errion, and W. W. Lock negotiated an option with R. S. Posey for forty acres of land for a site for Mt. Hood Hardboard and Plywood Cooperative.

16. On or about April 1, 1955, at Portland, Oregon, defendant Alan Wright assured members of Mt. Hood Hardboard and Plywood Cooperative that finances for the construction of the Mt. Hood Hardboard and Plywood Cooperative plant were available through an insured bond issue.

17. On or about April 2, 1955, at Portland, Oregon, defendant Alan Wright obtained a check of Mt. Hood Hardboard and Plywood Cooperative

for \$5,000.00 signed by defendant W. W. Lock, which check was deposited in defendant Wright's personal bank account.

18. On or about May 2, 1955, defendant Alan Wright filed articles of incorporation of Clackamas Building Association, Inc. with the Corporation Commission of Oregon.

19. On or about May 12, 1955, defendant W. W. Lock signed a deed conveying Mt. Hood Hardboard and Plywood Cooperative's real estate holdings to Clackamas Building Association, Inc.

20. On or about May 9, 1955, defendant W. W. Lock delivered to defendant Alan Wright a check drawn on the funds of Mt. Hood Hardboard and Plywood Cooperative payable to Clackamas Building Association, Inc. in the amount of \$290,000.

21. On or about May 12, 1955, the exact date being to the grand jurors unknown, at Portland, Oregon, defendant Glenn R. Munkers related to Roy Tucker, an employee of Mt. Hood Hardboard and Plywood Cooperative, that he had a commitment on his person under the terms of which all finances for construction of Mt. Hood Hardboard and Plywood Cooperative's plant were provided for.

22. On or about July 6, 1955, at Vancouver, Washington, in a conversation with James A. Snyder, treasurer of Mt. Hood Hardboard and Plywood Cooperative, defendant Edgar Robert Errion introduced defendant Glenn R. Munkers as a representative of the persons who were providing the finances for construction of the plant of Mt. Hood Hardboard and Plywood Cooperative.

23. On or about November 2, 1954, at Estacada, Oregon, defendant Archie L. Bones obtained a check for \$1,000.00 from Lewis I. Orrell for the purchase of a membership in Mt. Hood Hardboard and Plywood Cooperative.

24. On or about November 10, 1954, at Port-

land, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Marvin Zietlow.

25. On or about October 31, 1954, at Seaside, Oregon, defendant Howard Martin obtained a check for \$1,000.00 from Roy McKendricks for a membership in Mt. Hood Hardboard and Plywood Cooperative.

26. On or about October 12, 1954, at Milwaukie, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Hans O. Pedersen.

27. On or about March 3, 1955, defendant Roland L. Montgomery obtained, by Western Union money order, the sum of \$2,015.00 from Mahlon E. Montgomery for a membership in Mt. Hood Hardboard and Plywood Cooperative.

28. On or about May 1955, the exact date being to the grand jurors unknown, at Portland, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Herman Konoske for \$1,500.00.

* * * *

That portion of Count I descriptive of the scheme to defraud is set forth:

COUNT I.

Using the Mails to Defraud

18 U.S.C. 1341

1. That prior to March 1, 1954, and continuing to the date of this indictment, the defendants, Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, and Howard Martin, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative,

hereinafter called "purchasers," by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.

As a part of said scheme and artifice, on and prior to September 1954, defendants would and did arrange for the incorporation of an Oregon cooperative association under the name of Mt. Hood Hardboard and Plywood Cooperative (hereinafter called Mt. Hood), and would and did falsely and fraudulently represent to said purchasers of memberships that said Mt. Hood was about to construct a large and modern sawmill, plywood, and hardboard plant at Estacada, Oregon, which would be owned and operated by the members on the cooperative plan.

As a further part of said scheme and artifice, in September 1954, defendants would and did also cause to be organized and incorporated another Oregon cooperative association under the name of Forest Products Cooperative Agency, through which defendants would and did employ salesmen and carry on a large-scale sales campaign to sell memberships in Mt. Hood to purchasers residing in Oregon and elsewhere, and defendants would and did make and cause to be made to said purchasers the false representation, pretense, and promise that purchasers would obtain continuous employment and job security for themselves and their families in said operations of Mt. Hood, and would and did by this means sell memberships in said Mt. Hood at the rate of \$1,000.00 each to approximately 650 persons, for a total amount of approximately \$650,000.00.

As a further part of said scheme and artifice, defendants would and did organize and activate numerous other cooperative associations, including General Timber Cooperative, Timber Cooperative of America, Timber Cooperative of Oregon, Timber Exchange of America, and Timber Exchange of

Oregon, none of which associations had any assets or business activities, and all of which were used by defendants for the purpose of deluding and deceiving said purchasers into the false belief and impression that said cooperative organizations were able to and would furnish to said Mt. Hood all the timber needed for its operations, and were able to and would render valuable services to Mt. Hood in marketing its products.

As a further part of said scheme and artifice, defendants would and did have defendants Williams, Wright, and Lock, and persons related to them, dominate and control the board of directors of said Mt. Hood and officers of Mt. Hood.

As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate to Mt. Hood at great profit to said Davenport Corporation and defendants.

As a further part of said scheme and artifice, defendants would and did on or about May 2, 1955, cause to be organized a corporation known as Clackamas Building Association, Inc., and in order to lull said purchasers into a false sense of security and reassure them that construction of the

Mt. Hood plant was about to commence, would and did falsely and fraudulently represent to purchasers that said Clackamas Building Association, Inc. had made arrangements with, and obtained a commitment from, a responsible financial group that it would advance all necessary funds to the Clackamas Building Association, Inc. to provide for construction and equipping of the sawmill, hardboard, and plywood plant of St. Hood.

And it was a further part of said scheme and artifice that said defendants, in order to induce said purchasers to purchase memberships in Mt. Hood, and in order to lull the said purchasers into a false sense of security with respect to their purchases, and to falsely reassure said purchasers so they would induce others to purchase memberships, and in order to enable the defendants to convert to their own use and benefit and retain a large part of the moneys paid in by the purchasers for said memberships, and in order to induce said purchasers to retain their memberships, would and did make and cause to be made to said purchasers false and fraudulent pretenses, representations, and promises, including, among others, the following:

1. That purchasers of membership certificates would be assured of jobs and job security in a large, modern sawmill, plywood and hardboard plant to be constructed at Estacada, Oregon.

2. That sufficient finances had been arranged for and assured to pay for the entire cost of construction and equipping of a modern sawmill, plywood and hardboard plant, large enough to employ all members of Mt. Hood.

3. That a syndicate of wealthy timber owners, including Richard C. Williams, president of Mt. Hood, was making a large financial investment in the Mt. Hood enterprise for the purpose of providing a cooperative outlet for the manufacture of their timber into lumber and plywood.

4. That funds paid in by members to purchase certificates of membership in Mt. Hood would be retained in a reserve to provide working capital for use after commencement of operations of the plant of Mt. Hood.

5. That an adequate supply of logs for the initial operations of the plywood and hardboard plant was assured from timber held by Richard C. Williams, president of Mt. Hood, and other officers and promoters of Mt. Hood.

6. That General Timber Cooperative controlled large tracts of timber which would be adequate to supply timber for Mt. Hood's operations and would be sold to Mt. Hood at the market price.

In order that the court may more clearly understand appellee's view of the case, appellee's argument herein is first directed to appellant's Assignment of Error IV—"That the evidence is insufficient to sustain appellant's conviction", and Appellant's Assignment of Error VI—"The court erred in denying appellant's motion for a judgment of acquittal". Appellant's remaining assignments of error are answered in order.

The statement of facts (which appellant has placed in the appendix) does not set forth adequately the evidence in the record applicable to appellant. This evidence will be discussed fully in the Argument which follows immediately.¹

¹ Since appellant apparently does not contest the government's proofs that the memberships in Mt. Hood Hardboard and Plywood Cooperative which were sold in this venture were "securities" as defined in the Securities Act of 1933, and that the mails were used to execute the scheme to defraud, if such a scheme existed, attention has not been given to these points herein.

ARGUMENT**I.****THE EVIDENCE CLEARLY ESTABLISHES A SCHEME TO DEFRAUD AND FRAUD IN THE SALE OF SECURITIES AND APPELLANT'S WILFUL PARTICIPATION IN A CONSPIRACY TO COMMIT THOSE CRIMES** (Answer to Appellant's

Assignments of Error IV (App. Br. 46)
and VI (App. Br. 63).

Initially it may be pointed out that this court has frequently held that in reviewing the record at this time it will take the view of the evidence which is most favorable to the government and accept as true all facts which the evidence reasonably tends to show. *Suetter v. U. S.*, 140 F.2d 103, 107, 9 Cir. 1944; *Remmer v. U. S.*, 205 F.2d 277, 287-8, 9 Cir. 1953; *Schino v. U. S.*, 209 F.2d 67, 72, 9 Cir. 1954.

A. The Substantive Offenses, Use of the Mails in a Scheme to Defraud and Fraud in the Sale of Securities, Were Proven Conclusively.

The evidence clearly established, indeed appellant concedes, that a scheme to defraud was perpetrated upon investors in memberships in Mt. Hood (App. Br. 65). However, appellant's brief, in its description of the parts played by each of the defendants as well as others not named as defendants, somewhat subtly obscures the important and knowing role of appellant herself, characterizing her as a victim rather than an accomplice. The jury rejected this characterization claimed by appellant and found her guilty as a co-conspirator.

Without burdening the court with repetition of all of the details of the scheme set forth in appellant's brief, the circumstances of her extensive participation in it are herein summarized. In so doing, the government readily accepts appellant's description of Edgar Robert Errion as a "bold swindler" (App. Br. 65). As the evidence in the record will show, appellant well knew Errion's evil reputation, and with his other accomplices she did her part to conceal his master-minding of this scheme from the investors, many of whom had heard of Errion's prior fraudulent ventures and were apprehensive that he was a promoter of this one (Tr. 224-5, 242, 378, 452-3, 209).²

The scheme to defraud set forth in Count I, and applicable to Counts I through VII charging mail fraud³, was incorporated in the Securities Act counts (Counts VIII through XII), which additionally charged in the language of the statute the employment of the scheme, misrepresentations and omissions of material facts and fraudulent and deceitful transactions, practices, and courses of business in the sale of securities. The scheme, misrepresentations, fraudulent omissions and deceitful

² Page numbers shown relate to the transcript. Government exhibits referred to are described by the letter "G", and those of defendants by their names. The page number of the transcript at which the exhibit is admitted immediately follows the exhibit number.

³ Count IV was dismissed during the trial. Misrepresentations 3 and 5 set forth in Count I, which related to alleged timber holdings of Richard C. Williams, were withdrawn from the jury's consideration (Tr. 1760). Upon consent of all parties, the indictment against Williams was dismissed during the trial due to his serious heart condition (Tr. 1411-1414).

practices were all well-proven. The lure of the scheme was the promise made in the newspaper advertisements (Tr. 366, 456) (G. Exs. 127, 128, Tr. 746; G. Ex. 129, Tr. 749), sales literature, (Tr. 317, 469) (G. Ex. 28, Tr. 332), and by salesmen, that by purchasing a membership in Mt. Hood Hardboard and Plywood Cooperative "job security" was assured. For \$1,000 each investor-member would be guaranteed employment (Tr. 9) in a modern plywood and hardboard plant costing $3\frac{1}{2}$ to $5\frac{1}{2}$ million dollars, to be erected at once (Tr. 873). Investors were told that finances to construct the plant had been arranged for; the investors' own funds would be held and used only for working capital (Tr. 12, 66, 208-9, 230, 238, 314, 316, 367, 368, 457, 550, 780, 1204); timber in adequate supply was assured (Tr. 238, 368, 375, 383, 457, 551).⁴

⁴ Originally General Timber Cooperative was said to be the organization holding the timber to supply Mt. Hood (Tr. 368, 375). However, subsequently, General Timber Cooperative was succeeded in its purported functions by a new cooperative, Timber Cooperative of America, apparently because General Timber Cooperative had been a defendant in a prior injunction action by the SEC to enjoin it, Beaver Plywood Cooperative (a previous venture of Errion and Munkers) (Tr. 511, 517, 942, 953, 1091, 1207, 1220, 953), and others, from making fraudulent representations in connection with the sale of plywood cooperative memberships. At a later date, two additional "paper cooperatives", Timber Exchange of Oregon and Timber Exchange of America, were set up to succeed to the purported functions of Timber Cooperative of America. None of these cooperatives had any assets except the funds invested in them by Mt. Hood, itself (Tr. 953-4) (G. Ex. 135, Tr. 975; G. Ex. 8, Tr. 114, Mt. Hood Check No. 14 for \$1,000 for membership in General Timber Cooperative, and Check No. 99 for \$500 for membership in Timber Cooperative of America).

The evidence established conclusively that these representations were false. The finances were not available (Tr. 39, 758, 769) and desperate efforts to conceal this fact were made by guardedly exhibiting "letters of commitment" from fictitious persons (Tr. 524, 755, 757, 787, 988, 994) (G. Ex. 110, Tr. 657). Neither General Timber Cooperative nor its successor cooperatives had either timber or assets (Tr. 953-4).

Instead of being retained for working capital, the investors' funds were siphoned off until only approximately \$300,000 remained of the original \$550,000 paid in⁵ (G. Ex. 16, Tr. 131, Balance Sheet of Mt. Hood 7/31/55). A 10% fee for selling memberships was paid to Forest Products Cooperative Association, which was headed by Lock, Bones and Wright (Tr. 1222-28), additional charges were made by that cooperative against Mt. Hood for alleged "professional services etc." rendered by Williams, Munkers and Lock (G. Ex. 17, Tr. 131), another 10% fee was paid to The Davenport Corporation for organization and assistance in financing⁶ (Tr.

⁵ Originally the Mt. Hood plan contemplated the sale of 300 memberships. After a few weeks this was raised to 550 memberships (Tr. 1191). Actually, many more memberships were sold than the 550 limit. As members would become disgruntled, their funds were refunded and a new member was sold from the "waiting list" (Tr. 1197) (G. Ex. 13, Tr. 114, Mt. Hood Ledger, shows total receipts from memberships of \$632,500 and "refunds" of \$116,000; for examples of refund checks, see G. Ex. 10, Mt. Hood check stubs Nos. 82 to 92).

⁶ These fees were all provided for in contracts, drawn in advance of the meeting of incorporators of Mt. Hood and passed by the then eight "members" (Tr. 304-307).

1437-8, 206-7) (G. Ex. 10, Tr. 114, Mt. Hood Check stubs Nos. 98, 171, 178), salaries and expenses were liberally paid to Lock and Wright (G. Ex. 13, Tr. 114), fees as "financial engineer" to Munkers (Tr. 119-135, 1130), and a \$25,000 secret profit was taken by The Davenport Corporation on land which it purchased for Mt. Hood with Mt. Hood's own funds and employing Mt. Hood's own agents (Appellee's Br. 28-31).

B. Appellant's Participation in the Conspiracy to Commit the Substantive Crimes Was Amply Established by the Evidence.

1. Background of Appellant's Association with Errion

Helen A. Davenport, whose admitted age, uncertain from the record (Tr. 1420), but now suggested to the court dehors the record (App. Br. 2), is an experienced business woman (Tr. 1480, 1485) whose testimony on the trial showed her ready perception and discerning reply. She was no stranger to that "bold swindler" nor to his reputation as such. Dating her acquaintanceship from 1932 (Tr. 1487-88) she and her husband, since deceased, had provided some finances for his ill-fated oyster bed promotion at Coos Bay, Oregon (Tr. 1490, 1498).

In connection with the oyster bed *fiasco*, appellant was well-aware that one of the victims, Katherine Duniway, had recovered a fraud judgment against Errion for \$60,000 (Tr. 1524-27). She admitted loaning him \$30,000 (Tr. 1495) to help pay off this judgment, which, however, was left on the record undischarged (Tr. 1526-27).

As early as 1948 Errion had employed The Davenport Corporation⁷ as a "front" for his activities and had been authorized to draw checks against the corporation in connection with this enterprise (Tr. 1492-97). Appellant had joined with him in a log financing deal in Seattle, Washington, with one Kynell (Tr. 1492), the relationship terminating in a fraud suit by Kynell against Errion as well as her (Tr. 1494). She was aware that in January 1955, while the Mt. Hood promotion was being carried on, Errion had to move out of Oregon (Tr. 1495-96, 1525) because of a fraud judgment of "\$83,000 or \$93,000" against him (Tr. 1494-96, 1526). She, too, had been connected with transactions in which Errion had defrauded a Mrs. Connell of Seattle. Mrs. Connell recovered a fraud judgment against Errion and obtained a writ of garnishment against appellant who then reluctantly parted with an annuity of Mrs. Connell's which Errion had assigned to her. It is interesting to note that when questioned regarding this garnishment, appellant at first denied having anything of Errion's (Tr. 1528, 1533), then admitted having "a bill of sale of one other vehicle" (Tr. 1536), and finally, when questioned directly about having Mrs. Connell's annuity, admitted she had it and that she "gave it back" (Tr. 1537).

⁷ This corporation was organized in Oregon in 1938 by Mrs. Davenport and her husband, and upon his death she held all stock except qualifying shares (Tr. 1497). The corporation was authorized to and did engage in varied business, including real estate, money loans, property and estate management (Tr. 1420) (Davenport Ex. 3, Tr. 1542).

Appellant's home at times during this promotion included an apartment occupied by Errion and his wife (Tr. 1283, 1334, 1338). Errion held a telephone credit card for her telephone number, and charged bills running as high as \$783 (Tr. 1517-19). Errion had rented office space in the building adjoining her home (Tr. 1119) and it was there that the Mt. Hood plan was born (Tr. 1423-25).

Appellant, with Munkers and Lock, handled the marshalling of funds to pay off the mortgage on Errion's Oak Knoll Farm to keep it from going on the block in foreclosure proceedings (Tr. 1439-40, 1481-85, 1461). This property, together with such bizarre possessions as a Cadillac convertible (Tr. 605-6), found its way eventually into the corporate assets of Valley View, Inc., which it was testified was set up for the benefit of co-defendants Lock and Bones to insure repayment to them of "loans" made by them to Errion (Tr. 605-6, 1231, 1662-64, 1716-19, 1730-31). This corporation was managed by Errion's wife, Amy (Tr. 1663).

2. Participation by Appellant and Davenport Corporation in the Mt. Hood Scheme

Against this background of appellant's close association with Errion and other defendants, let us next consider her participation in the Mt. Hood promotion. At a time when she knew that Errion had been found civilly liable for the fraud judgments in Oregon (Tr. 739, 1495, 1525), he discussed with her an arrangement whereby the bank account of The Davenport Corporation would be used as a transient depository for the

fee to be received by Errion for the Mt. Hood promotion (Tr. 1426-29). This fee was to be 10% of the total membership funds received by Mt. Hood. Appellant's testimony that this banking convenience for Errion was set up to protect him from a judgment against him (Tr. 1426) became rather obscure when she was put to an explanation for the necessity of the arrangement, since the fraud judgment which she claimed to be the reason therefor had been paid off and merely left on the record (Tr. 1496, 1527).

Regarding her arrangement with Errion, appellant testified (Tr. 1427):

"Then he asked me—I asked him what my duties would be, and he said that there would be none. There would be no business conducted of any kind, that I simply would handle his 10% that he was to receive, and that I would open a special bank account in the name of The Davenport Corporation and accept the 10%, accept the money that he received there, and then pay it out to his order . . ."

Despite appellant's protestations of her ignorance, the evidence is convincing that she knew much more of the details of the Mt. Hood scheme than she would admit. She knew that the plan was based on the idea of constructing a large and modern plant to "provide labor under fine conditions" for the men that belonged to the cooperative, complete with plans for housing, churches, schools and recreation centers (Tr. 1425). Appellant, of course, realized that such an alluring proposition would quickly attract large numbers of common workers throughout Oregon, all in search of

the promised "job security". In fact, she inquired frequently at the Mt. Hood office "how the money was coming in" (Tr. 1282). Certainly this astute business woman knew that this required financing on a large scale. With this knowledge, she signed her name as president of The Davenport Corporation to the very contract by which Errion's 10% fee was allowed, which contract provided that the fee was paid for services, including "assisting the cooperative in obtaining financing" (Tr. 1479) (G. Ex. 6, Tr. 285, Contract between Mt. Hood and The Davenport Corporation contained in Minute Book of Mt. Hood). This contract also provided that these duties were to be performed by The Davenport Corporation with "due diligence".⁸

The words:

"Copyrighted by The Davenport Corporation
Portland, Oregon"

were imprinted on the sales literature (G. Ex. 28, Tr. 332), the applications for membership forms (G. Ex. 130, Tr. 877) and even on the membership certificates (G. Ex. 4, Tr. 15). Appellant was fully aware this had been done, and in fact appears to have been zealous to keep in her possession the copyrights obtained from Washington, D. C. on this material "because they were her property" (Tr. 1283). She again claimed that "The copyrights were made out in the name of The Daven-

⁸ At the very outset of the promotion, appellant notarized the document by which the selling cooperative, Forest Products Cooperative Association, was organized (Tr. 1184). This cooperative also received a 10% fee for the sale of memberships (G. Ex. 27, Tr. 283) of which Errion, Munkers, Lock, Bones and Wright all received some part.

port Corporation because Mr. Errion could not have them made out in his name" (Tr. 1430), perhaps implying more frankly than intended that Errion was plainly hiding behind her then reputable skirts, with her permission.

Appellant's "arm-in-arm" collaboration with Errion and other defendants in the studied concealment of his identity with this promotion is made patently evident in the testimony and exhibits relating to the handling of funds through The Davenport Corporation bank account (Tr. 1441-44). Appellant's testimony in this connection was as follows (Tr. 1441):

"A Now, when this money would come in from the Hardboard Company while Mr. Errion was in Oregon he sometimes went right to the bank, came over and went right to the bank with me, and his wife, I think, drove the car because he does not drive, and took him to the bank. I would deposit the money and get cashier's checks and give them to him.

Q Well, now, let's explain that a little further please. A great many of these checks that appear in there were drawn in favor of the Davenport Corporation?

A They were drawn for what?

Q They were drawn payable to the Davenport Corporation?

A Yes, and those were handed right direct to him. Now, those were done—he explained to me that those were done and they were done right in the bank there, the checks were drawn to the Davenport Corporation, and then I endorsed them and handed them to him because he could not do business in his own name on account of that.

Q What did you do, again, now?

THE COURT: You were talking about the fact that he did this because he couldn't do business in his own name? What did he do?

THE WITNESS: I didn't understand it.

THE COURT: You were telling us in your last answer that he did certain things because he couldn't do business in his own name. Now what was it that he did?

THE WITNESS: Well, he took these, and he wanted these checks drawn to the Davenport Corporation and just endorsed because he couldn't have them drawn directly to him, and I endorsed them and handed them to him.

MR. DIBBLE: Q You are speaking now of the checks that you received from the Mt. Hood?

A Yes, sir.

Q They were made payable to the Davenport Corporation?

A And endorsed and immediately deposited, and a check bought, signed over to Mr.—and endorsed and given to Mr. Errion.

Q He would bring the check to you?

A Yes, sir.

Q It was payable to the Davenport Corporation?

A Yes, sir.

Q Would you and he go to the bank together?

A Yes.

Q That is this First National Branch down here at Sixth and Morrison?

A Yes.

Q Then do I understand that you endorsed the check on behalf of the Davenport Corporation; is that right?

A I would buy a cashier's check and endorse the cashier's check and give it to Mr. Errion.

Q First you would endorse the Mt. Hood check?

A Yes, sir.

Q On behalf of the Davenport Corporation?

A And deposit it.

Q Yes; then you would purchase a cashier's check from the bank?

A Right there.

Q Is that right?

A Yes, sir.

Q And that would be made payable, the cashier's check, to the Davenport Corporation?

A Yes, sir.

Q Then, as I understand it, you would endorse that cashier's check?

A Yes, sir.

Q On behalf of the Davenport Corporation?

A That's right.

Q You would turn that check over to Mr. Errion?

A Yes, sir.

Q Did that happen on numerous occasions?

A Did what?

Q Did that happen on many occasions?

A Yes."

The mass of applications for cashier's and certified checks made by her personally (G. Ex. 58-66, Tr. 618) (G. Ex. 71-107, Tr. 820), her personal endorsement of each of these cashier's checks for cash or for the reissuance of still more cashier's checks to be turned over to Errion, who was standing literally at her elbow, are actions scarcely in character for one devoted only to seeing that "everything was done correctly and in a businesslike way" (Tr. 1468). Her explanation that Errion needed the cashier's checks because he might have an opportunity to buy timber at a very advantageous price and the checks could be used instantly (Tr. 1459) was no more convincing than her statement that she did not know what Errion did with the checks because "I never asked any questions" (Tr. 1452).

The disbursements made by appellant from The Davenport Corporation account other than for cashier's checks (G. Ex. 56, Book of Cancelled Checks and Check Stubs of The Davenport Corporation, Tr. 627) are also

illuminating of appellant's relationship to co-conspirators Errion, Lock, and Munkers. During the period when the account was opened and being handled by her, she personally signed over 100 checks for amounts totalling approximately \$110,000. From this account she issued checks to Lock (Tr. 1461) (G. Ex. 56, Checks No. 100, \$700; No. 120, \$300; No. 152, \$600) and to herself (No. 157, \$500; No. 166, \$1,000) for repayments on "loans" allegedly made to Errion to save his Oak Knoll Farm from a mortgage foreclosure (Tr. 1439), a deal in which Munkers again lent her his helping hand with the details (Tr. 1483-84). From this account she issued checks to Munkers (No. 102, \$150; No. 104, \$350; No. 115, \$150) for "expenses in connection with his California trip" (Tr. 1045) and for business expenses (No. 196, \$500, to First National Bank for account of Glenn Munkers). She paid herself \$2,500, Check No. 181, in part payment on the amount Errion allegedly promised her for use of her bank account (Tr. 1459-60).

On February 4, 1955, appellant issued Check No. 165 of The Davenport Corporation in the amount of \$10,000 for the purchase of timber lands in California. Her testimony regarding this transaction gives the lie to her pretense that her interest in The Davenport Corporation bank account was merely a clerical one for the convenience of Errion (Tr. 1445). Appellant testified in connection with this \$10,000 check, that she had received a long-distance telephone call from Errion in California, requesting that she send him \$10,000 to buy a strategic piece of timber (Tr. 1461). This was for use in connection with the promotion of a second ply-

wood cooperative to be set up in California, known as Mt. Shasta Hardboard and Plywood Cooperative (Tr. 1464, 1498-99).⁹ Despite her earlier testimony concerning The Davenport Corporation bank account that "every cent of it went to Mr. Errion's order" (Tr. 1445), appellant now appeared in the unexpected role of refusing to send to Errion the \$10,000 which he requested to purchase this timberland. Instead, she insisted that the funds go through the hands of her nephew, Ira Weaver, and be kept under her control to protect her interest and good name (Tr. 1499-1501, 1463-65), and she was anxious that the funds be used only to buy land "so that I could hold the property to get something on the indebtedness he had" and not to start another promotion (Tr. 1501-2). In fact, it appears that the moneys were

⁹ The "grand plan" contemplated by Errion and his associates called for the formation of at least nine cooperatives, patterned after the Mt. Hood venture, to be located throughout the nation. In each case, The Davenport Corporation was to assist in the financing (Tr. 1270-71. Following the incorporation of Mt. Hood in Oregon, the second unit, Mt. Shasta Hardboard and Plywood Cooperative, was organized in California. Errion, Munkers and Mrs. Davenport's nephew, Ira Weaver, were among the organizers (Tr. 1271) and Wright was in charge of the sale of memberships. Munkers was employed by The Davenport Corporation to purchase property for Mt. Shasta (Tr. 1132) and as early as October 1954 had received checks signed by appellant for "Expenses California trip" (G. Ex. 56, Checks Nos. 102, 104, 115), and on February 22, 1955, appellant issued Davenport Corporation Check No. 178 to Ira Weaver for "Business expenses in California". Thirty-three memberships in Mt. Shasta were sold for a total of \$99,000. The promotion was halted abruptly by a cease and desist order issued by the California Corporation Commission (Tr. 1272, 1507).

so used to buy land in the name of The Davenport Corporation, where apparently title still remains (Tr. 1502, 1473).

When questioned as to whether her nephew, Weaver, had warned her of Errion's reputation as a swindler and whether she thereafter continued to allow him to use The Davenport Corporation bank account, she replied (Tr. 1505-08), "Well, I don't consider that account so very much my account when it was 90% his account and 10% my own, but I didn't get the 10%."

Appellant's concern for the welfare of Errion extended even beyond her term as his banker. When it was necessary for her to travel and be away from the situation, she enlisted to replace her as his financial secretary, one Freda Piatt, and entrusted her with the authority to use The Davenport Corporation bank account (Tr. 566-69). Piatt then drew out the remaining funds in the account and converted all cashier's checks payable to The Davenport Corporation into cash. She carried around in her handbag at one time an amount of at least \$34,000 (Tr. 574-75).

The use of The Davenport Corporation to siphon off the Mt. Hood investors' funds by taking secret profits on real estate deals which were risk-free to The Davenport Corporation was an important feature of the fraudulent scheme in this case and could not have been accomplished without the direct participation of Mrs. Davenport (Tr. 1033) and her corporation's bank account. These unconscionable transactions may be summarized from the testimony and exhibits as follows:

Two tracts of land were involved, identified by the names of their former owners as the Posey tract and the Alspaugh tract. An option to purchase the Posey tract was negotiated on November 18, 1954 by Williams, then president of Mt. Hood, Lock, its secretary, Errion and Munkers (Tr. 904-6), who was paid by Mt. Hood for his services in selecting a site (Tr. 1110-13) (Munkers Ex. 3, Tr. 1074). The option price was \$14,000, and the option was taken in the name of Lock (G. Ex. 138, Tr. 911), who paid \$100 at that time and \$550 later, for which he was reimbursed by check of The Davenport Corporation issued by Mrs. Davenport December 6, 1954 (G. Ex. 56, Tr. 1516, Davenport Corporation Check No. 128). The option was to be exercised by the payment of the balance of \$13,250 before February 18, 1955.

On December 17, 1954, a 90-day option on the Alspaugh tract for a price of \$19,500 was negotiated by Lewis K. Banks (G. Ex. 136, Tr. 926), who was in the employ of Mt. Hood (Tr. 916). At Errion's instruction the option ran to The Davenport Corporation (Tr. 920). Banks advanced his own funds to pay the \$500 option payment, for which he was reimbursed by a check of The Davenport Corporation issued by Mrs. Davenport (Tr. 921, 1472, 1516).

With the site selected by Mt. Hood employees and agents, under option to The Davenport Corporation for a total price of \$33,500, the directors of Mt. Hood, including Lock and his brother-in-law, Current, on January 24, 1955 authorized "that a check be made out to

The Davenport Corporation for \$31,500 to apply on the purchase of 90 acres of land at Estacada" (G. Ex. 6, Minutes of Mt. Hood). Pursuant to this resolution, on February 2, a check in this amount was issued by Mt. Hood to The Davenport Corporation (G. Ex. 8, Mt. Hood Check No. 150). Appellant then issued a check of The Davenport Corporation on February 10, 1955, for \$19,087.57 to Title and Trust Company for the balance due on the Alspaugh property (G. Ex. 56, Davenport Corporation Check No. 170). Munkers and Mrs. Davenport in person had this check certified at the bank (Tr. 1038), and Munkers then delivered it to the title company. Mrs. Davenport personally signed the escrow agreement delivered with the check (Munkers Ex. 2, Tr. 1036).

At this point in the transaction The Davenport Corporation had a net profit balance of approximately \$12,000. On February 10, 1955, the Mt. Hood directors, again including Lock and Current, authorized "that checks be issued to pay for the balance of our land at Estacada in the amount of \$27,000." (Ex. 6, Minutes of Mt. Hood). Pursuant to this resolution, on February 12, 1955, a check in the amount of \$18,000 was issued by Mt. Hood to The Davenport Corporation (G. Ex. 8, Mt. Hood Check No. 169). The Davenport Corporation now had a net balance from the payments received from Mt. Hood of approximately \$30,000. On February 14, 1955, appellant issued a check of The Davenport Corporation to the Poseys in the amount of \$13,250, which Munkers delivered (Tr. 1039). On February 16, 1955,

Mt. Hood issued its third check, for \$9,000, to The Davenport Corporation for the balance of the \$27,000 authorized February 10 (G. Ex. 8, Mt. Hood Check No. 177). Thus the Davenport Corporation, risking nothing but small option payments (if, indeed, there was any risk at all involved in the arrangement), and acting through and with the connivance of Mt. Hood's own officers and employees, was able to drain off from the Mt. Hood investors' funds which were to be "reserved for working capital", a secret profit of over \$25,000.¹⁰

The testimony of appellant as to her knowledge of this unconscionable deal rings neither true nor plausible. She acknowledged that she was a woman experienced in real estate transactions (Tr. 1467) and had authorized Munkers to act for her "to see that everything was done correctly and in a businesslike way" (Tr. 1468, 1033-38). She received and disbursed all checks relating to the transactions, both for the option payments and the balances of the purchase price, signed the escrow agreement on the Alspaugh property, attended to the certification of checks and the execution of the deed of conveyance. She even gave Munkers the check for revenue stamps to be affixed to the deed (Tr. 1103). Yet when it came to honestly admitting she knew the price of the land (Tr. 1468-71) or that The Davenport Corporation had realized a profit on the transactions¹¹ she denied any knowl-

¹⁰ The deeds from Alspaugh and Posey were taken in the name of The Davenport Corporation (G. Exs. 139-40, Tr. 935), which then deeded the combined properties to Mt. Hood by deed signed by appellant as president of The Davenport Corporation (Tr. 1471) (G. Ex. 141, Tr. 935).

edge of the details and testified that she did not even know her bank balances (Tr. 1510-15). Yet appellant, under previous examination by her own counsel, had testified with a vivid recollection, covering nearly twenty pages of transcript, to the minute details of the nearly one hundred other checks she had written and recorded in her "little book" (Tr. 1433, 1443-65).

C. Appellant's Guilt or Innocence Was Properly Submitted for the Jury's Determination Upon These Facts.

Appellant argues that the evidence to support the finding of the illegal agreement in this case "as to each accused had to be direct evidence of actual knowledge of the fraud" (App. Br. 53). This appears to be an incorrect statement of the law.¹²

In *Blumenthal v. U. S.*, 158 F.2d 883, 9 Cir. 1946, aff. 332 U.S. 539, this court said, at page 889:

¹¹ It is interesting to note that co-defendants Munkers (Tr. 1103-4) and Lock at least admitted that they knew of the secret profits on the deal. Lock testified that he didn't like it but kept his mouth shut (Tr. 1696-97).

¹² Appellant also contends: "Circumstantial evidence of knowledge, however, cannot preclude, as a matter of law, a reasonable hypothesis of actual ignorance . . ." (App. Br. 53). The law in this circuit is set forth succinctly in *Charles v. U. S.*, 215 F.2d 831, 9 Cir. 1954, at 833:

"It is true that some of the evidence was circumstantial. However, it could not and cannot be said, as a matter of law, that reasonable minds could not conclude that the evidence was inconsistent with every reasonable hypothesis of innocence. Therefore whether the evidence was inconsistent with every such hypothesis was a question for the jury and not for the District Court or this court to determine." See also *Holland v. U. S.*, 348 U.S. 121.

"The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact, conspiracy may be proved by circumstantial evidence. . . . To constitute an unlawful conspiracy no formal agreement is necessary. . . . The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. . . . The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. . . ." (Cases cited omitted)

See also *Levine v. U. S.*, 79 F.2d 364, at 370, 9 Cir. 1935; *Allen v. U. S.*, 4 F.2d 688, 691, 7 Cir. 1924. In *Pereira v. U. S.*, 347 U.S. 1, conviction on conspiracy was sustained although there was no direct evidence of an agreement to use the mails, the court holding that it was proper to allow the jury to determine from the circumstances and the close association of the co-conspirators whether the "details related to the realization of their common goal had been agreed upon".

On the facts established at the trial there was definite and ample evidence from which a jury might find that Errion and his associates, including appellant, were by agreement pursuing the common purpose of perpetrating a fraud upon investors in Mt. Hood memberships. The fraud consisted of misrepresentation and omission to inform the investors of material facts in regard to at least three important matters:

1. The ability of the promoters to supply financing for a plan which would provide job security to the investors.

2. The availability of timber resources to sustain the plant's operations.

3. The preservation of the investors' funds to provide a reserve of working capital when operations would commence.

The fraud included the skillful siphoning off of these fraudulently-obtained funds of investors, through various means, including payment of fees to The Davenport Corporation and Forest Products Cooperative Association, purchase of memberships in General Timber Cooperative and Timber Cooperative of America, secret profits on land sold to Mt. Hood, and finally by the apparent attempt to appropriate the entire remaining assets of Mt. Hood through the \$290,000 check payment to Clackamas Building Association, Inc.

All the defendants shared in the ill-gotten gains. Munkers, Lock, Bones and Wright collected "fees" and salaries from Forest Products Cooperative Association, The Davenport Corporation and Mt. Hood. Errion and appellant shared in the \$80,000 collected by The Davenport Corporation, appellant repaying herself on alleged "loans" made to Errion, withdrawing \$10,000 to buy timberlands in California in the name of The Davenport Corporation and withdrawing an additional \$2,500 as payment on her "fee".

The government does not claim that appellant participated in each facet of the scheme nor was such required to sustain her conviction. As explained in *Allen v. U. S.*, *supra*:

"If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others."

Appellant, having knowledge of the representations made and being intimately associated with the organization of the project, was chargeable with responsibility for the acts of the agents, salesmen and co-conspirators and had a duty to disclose to them and to investors the real facts concerning such material matters as the financing that had been obtained for Mt. Hood, the timber that was available to it and the manner in which their funds were being dissipated. Her position is the worse, since with full knowledge that the financing of the plant was ever becoming a more crucial question during the sales campaign and thereafter before the funds were dissipated, she made no effort to question Errion or to determine the availability of financing (at least there is not a shred of evidence that she did), admitting finally that she had no idea where the finances were coming from (Tr. 948).

Van Riper v. U. S., 13 F.2d 961, 966, 2 Cir. 1926:

"Sweet was the company's president, and negotiated the contract with Kuykendall and the lease with Tingley. . . . It is, of course, impossible to say that he must have known how the stock was being sold, nor is it necessary. A man who connects himself so closely with such an enterprise presumably has a live interest in it, which leads him to keep informed. His opportunities for information and his motive to get it justify a conclusion which he may be called upon to answer. In the end the question lies with a jury how far he has succeeded."

The attempt by appellant, while on the witness stand, to dodge all responsibility and claim complete ignorance of the details of the scheme may have weighed heavily with the jury, viewing firsthand her wary demeanor. As stated in *Seeman v. U. S.*, 96 F.2d 732, 5 Cir. 1938:

“The jury was entitled to consider his manner of testifying, his interest in the case, and any evidence tending to contradict him. We do not know what impression he made upon the jury. But it well may be that the jury concluded he was not truthful in attempting to explain the transaction of the telegram. If so, that would tend to show his consciousness of guilt and was evidence to be considered in connection with all the other evidence in the case.”

II.

THE INDICTMENT PROPERLY CHARGED APPELLANT WITH THE CRIME OF CONSPIRACY (Answer to Appellant's Assignments of Error I and I-A).

The language of Count XIII, the conspiracy count, follows the usual form. See *Nemec v. U. S.*, 178 F.2d 656, 9 Cir. 1954; *Donaldson v. U. S.*, 248 F.2d 364, 9 Cir. 1957; *Allen v. U. S.*, 186 F.2d 439, 9 Cir. 1951, cert. den. 341 U.S. 948; *Walters v. U. S.*, CCH ¶ 90851, 9 Cir. Apr. 11, 1958. It alleged defendants performed twenty-eight overt acts in addition to the acts alleged in the substantive counts. Appellant was specifically identified with four of the described overt acts Nos. 7, 12, 13, 14. The alleged scheme which was set forth in Count I and incorporated by reference in the conspiracy count, included the making of false representations, namely,

that investors in memberships were assured of a job in a large, modern plywood-hardboard plant and sawmill, that finances for the construction of the plant had been assured, that investors' funds would be held in reserve and used only for working capital, that General Timber Cooperative controlled huge timber tracts which would supply Mt. Hood's operations; the scheme also embraced arrangements for the incorporation of the principal vehicle for the fraud, Mt. Hood Hardboard & Plywood Cooperative and for the incorporation of the selling cooperative, Forest Products Cooperative Agency, and other "window dressing" cooperatives, including General Timber Cooperative, Timber Cooperative of America, Timber Cooperative of Oregon, Timber Exchange of America and Timber Exchange of Oregon, none of which, it is claimed, had any substantial assets; the arrangements for the contract with The Davenport Corporation whereby defendants would siphon off a portion of the monies from the sale of memberships and further siphon off funds by an unconscionable markup in the price of real estate to be purchased with the membership funds; and, finally, the organization of Clackamas Building Association, Inc., reportedly to make good the promise of financing its construction of the plant on which the entire venture hinged. This certainly furnished appellant with an outline of the scheme sufficient to enable her to prepare her defenses and defend against a charge should she again be accused. If, as Count XIII, the conspiracy count, charged, she conspired, combined, confederated, and agreed with the other named defendants to violate the Mail Fraud Statute and the Securities Act

by employing said scheme in connection with the sale of memberships of the Mt. Hood Hardboard & Plywood Cooperative, she was clearly guilty of a crime.

It is difficult to ascertain the exact nature of appellant's complaint with respect to the government's indictment. Initially, it should be pointed out the record reveals that appellant filed no motion attacking the indictment prior to the trial, and at no time prior to the government's case was any protest made that she was unable to defend herself for lack of specificity.¹³ Under Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure, appellant might properly raise an objection to the failure of the indictment to charge an offense at any time during the pendency of the proceedings; no mere defect as to the form of the indictment, however, may properly be raised after having proceeded to trial.¹⁴

Appellant (App. Br. 5) refers to the fact that the "conspiracy count contains no independent allegations

¹³ Appellant did join with the other defendants at the close of the government's case on motion for acquittal based on the ground "that each of the several and separate counts in the indictment fails to state sufficient facts to constitute a crime as claimed by the government, and the facts are insufficient in the indictment, and, secondly, that the facts adduced at the trial have been insufficient to sustain a conviction in each of the several instances as to each of the separate defendants" (Tr. 1013, 1020).

¹⁴ See note 13 to Rule 12, Federal Rules of Criminal Procedure; *U. S. v. Williams*, 202 F.2d 712, 5 Cir. 1953, *reh. den.*, 203 F.2d 572, *cert. den.*, 346 U.S. 822; *Witt v. U. S.*, 196 F.2d 285, 9 Cir. 1952, *cert. den.*, 344 U.S. 827; *Lelles v. U. S.*, 241 F.2d 21, 9 Cir. 1957, *cert. den.* 353 U.S. 974, *reh. den.*, 354 U.S. 944.

of fact". If appellant is suggesting that the conspiracy count is inadequate in incorporating by reference the scheme alleged in Count I merely because appellant is not charged with a violation in Count I, she has mistaken the purpose of incorporation by reference, which is not to charge defendants with the crime alleged in the prior count but only to avoid repeating the description of the acts set forth in that count. Thus it has been held that even where the count setting forth a mail fraud scheme is fatally defective, subsequent counts might properly utilize the defective count as a "reference" for the purpose of incorporating the scheme set forth therein. See, e.g., *U. S. v. Monjar*, 47 F. Supp. 421, 425 (D. Del. 1942), aff'd 147 F.2d 916, 3 Cir. 1944, cert. den. 325 U.S. 859, citing *Touhy v. U. S.*, 88 F.2d 930, 8 Cir. 1937, and *Bell v. U. S.*, 100 F.2d 474, 5 Cir. 1938. Cf. *U. S. v. Cohen*, 145 F.2d 82, 95, 2 Cir. 1944, cert. den. 323 U.S. 799, discussed below.

As stated by the court in *Chew v. U. S.*, 9 F.2d 348, 352, 8 Cir. 1925:

"We think that the allegations of this count, including by reference the matter in the preceding counts, constitute a direct charge that the defendants conspired to devise the scheme set forth on those counts and to make use of the mails in carrying it out. The allegation of conspiring includes the element of intent. *Frohwerk v. United States*, 249 U.S. 204, 209, 38 S.Ct. 249, 63 L.Ed. 561. The allegations as to the overt acts make complete the conspiracy count."

If appellant's contention is that the indictment is defective on the basis that failure of the grand jury to

charge her with violation of the substantive counts was tantamount to acquittal (App. Br. 54, 57) and precludes the facts alleged therein from being used against her in the conspiracy count, it is based on false assumptions of fact and law. The fact that a grand jury has not indicted can in no way be construed to indicate that a person may not be guilty. *Alexander v. U. S.*, 95 F.2d 873, 8 Cir. 1938, cert. den. 305 U.S. 637. The constitutional provision against double jeopardy precludes a person from being tried again for the same offense after an acquittal, but the same facts can be lawfully presented time and again to successive grand juries and the failure of earlier grand juries to indict would have no bearing upon the right of subsequent grand juries to do so.¹⁵ *U. S. v. Thompson*, 251 U.S. 407.

The argument also falsely assumes that an acquittal on the substantive counts would compel an acquittal on the conspiracy count (App. Br. 39). *Shayne v. U. S.*, 9 Cir. No. 15406, May 10, 1958. That this is not so is made clear by cases holding (a) that a person can be guilty of a conspiracy to commit an act even though he may be not guilty of the substantive offense, and (b) that even if a verdict is inconsistent it may nevertheless be sustained. With respect to the first of these propositions, *U. S. v. Cohen*, *supra*, is a direct holding. There, the Circuit Court held:

“As to count 19 [mail fraud], while there was

¹⁵ Indeed, it is established that the same facts can be used to support the conviction of an individual of three separate crimes requiring different elements. *Gore v. U. S.*, 26 Law Week 4532 (1958) and *Blockburger v. U. S.*, 284 U.S. 299, cited therein.

ample testimony to support a verdict that Joel Rosenberg was party to the fraud upon the McDonalds, Mussman was altogether vague as to the time when Joel joined him and Goldie in the transaction, and there was no other testimony to fix it. The 'count letter' being dated December 7, 1936, and the posting of the letter being under all the authorities the corpus delicti, there was no evidence to support the verdict. *Olsen v. U.S.*, 2 Cir., 287 F. 85; *Armstrong v. U.S.*, 10 Cir., 65 F.2d 853, 857. For these reasons the conviction of Joel Rosenberg on counts 7 and 19 must be reversed.

"On the other hand his conviction on the conspiracy count should be affirmed. As we have just said, there was testimony directly connecting him with the McDonald frauds, and his argument that the jury should not have believed it is unsound, as we have seen."

And see also *Van Riper v. U. S.*, 13 F.2d 961, 966-967, 2 Cir. 1926; *Allen v. U. S.*, 186 F.2d 439, 444, 9 Cir. 1951, *cert. den.* 341 U.S. 948 (1951). Cf. *Pereira v. U. S.*, 347 U.S. 1 (1954).

As to the permissibility of inconsistent verdicts, this Court said in *Coplin v. U. S.*, 88 F.2d 652, 661, 9 Cir. 1937, *cert. den.* 302 U.S. 703:

"This question has been so recently and so fully discussed by this court that voluminous citation of authority is unnecessary. See *Macklin v. United States (C.C.A.)*, 79 F.2d 756, 758-759, and the cases there cited."¹⁶

¹⁶ The Macklin case, 9 Cir. 1935, cites, *inter alia*, *Dunn v. U. S.*, 284 U.S. 390 (1932); and *Bilboa v. U. S.*, 287 Fed. 125, 127, 9 Cir. 1923. Among the subsequent cases in this Court to the same effect are *Suetter v. U. S.*, 140 F.2d 103, 108 (1944); *Stein v. U. S.*, 153 F.2d 737, 744 (1946), *cert. den.*, 328 U.S. 832 (1946); *Robinson v. U. S.*, 175 F.2d 4, 10 (1949), *cert. den.*,

Whatever may have been the reason for the inclusion of appellant only in the conspiracy count, the grand jury, was, of course, under no compulsion to charge her with additional crimes. It is anomalous for her to complain that she was charged with only one crime in one count rather than with three types of crimes in 13 counts.

III.

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR SEPARATE TRIAL¹⁷ (Answer to Appellant's Assignment of Error II).

Rule 14 of the Federal Rules of Criminal Procedure, which is a restatement of existing law, provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

An application by a defendant for separate trial¹⁸

338 U.S. 832, (1949); *Catrino v. U. S.*, 176 F.2d 884, 888 (1949); *Langford v. U. S.*, 178 F.2d 48, 52 (1949), *cert. den.*, 339 U.S. 938 (1950); *Bridgman v. U. S.*, 183 F.2d 750, 753 (1950); and *Thomas v. U. S.*, 227 F.2d 667, 671 (1955), *cert. den.*, 350 U.S. 911.

¹⁷ Appellant's argument under Assignment of Error II appears directed to the claim of prejudicial joinder and also error in the court's instructions. The latter point is considered herein under appellee's argument Point IV.

¹⁸ Appellant's motion for severance, filed prior to the trial, was in the following language: "The Defendant Helen A. Davenport by and through her Attorney Dan M. Dibble, moves the

is addressed to the discretion of the court, and as a general rule should be denied to avoid piecemeal trial of criminal cases in the absence of a compelling showing of prejudice. *Tincher v. U. S.*, 11 F.2d 18, at 21, 4 Cir. 1926, *cert. den.* 271 U.S. 664; *Shockley v. U. S.*, 166 F.2d 704, 9 Cir. 1948, *cert. den.* 334 U.S. 850. The motion is rarely granted. In *Olmstead v. U. S.*, 79 F.2d 842, 9 Cir. 1927, *cert. den.* 275 U.S. 557, *aff.* 277 U.S. 438, the Ninth Circuit Court of Appeals said:

“In conspiracy cases, the rule in the federal courts is that severance is permissible, and that the courts are vested with judicial discretion to order it, but that the exercise of that discretion is not subject to review except for abuse. *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 400; *Reike v. U. S.*, 227 U.S. 131, 33 S. Ct. 226, 57 L. Ed. 450. *Ann. Cas.* 1914C, 128; *Scheib v. United States (C.C.A.)*, 14 F.(2d) 75.”

In cases of mail fraud and conspiracy it is a general rule that persons jointly indicted should be tried together. *Hall v. U. S.*, 168 F.2d 161, D.C. Cir. 1948. As stated in *Dowdy v. U. S.*, 46 F.2d 417, at 421, 4 Cir. 1931:

“Where two or more defendants are indicted for a joint transaction it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor. This is particularly true in conspiracy charges from the very nature of the case.”

To the same effect see *U. S. v. Schwartzberg*, 241 Fed. 348, 2 Cir.; *U. S. v. Allen*, 202 F.2d 329, D.C. Cir. 1952; *U. S. v. Lebron*, 22 F.2d 531, 2 Cir. 1955.

Court for an order allowing and permitting a severance of the trial of her case in the above entitled action upon the ground and for the reason that she would be prejudiced by remaining joined as a co-defendant.”

Whatever inconvenience may result to the defendants in this case, it may be said in the language of Judge Augustus Hand in *Fradkin v. U. S.*, 81 F.2d 56, 2 Cir. 1936: "A man takes some risk in choosing his associates and if he is haled into court with them he must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats."

As will be indicated herein under Point III, appellant's rights were safeguarded by the court's instructions and precautionary remarks throughout the trial. In a case such as this, where each of the parties to the scheme contributed acts which were intended to and did contribute to the overall fraudulent plan, fairness to all accused, as well as to the government, requires that the entire story be unfolded in a single trial. That the jury here carefully weighed the evidence as to each defendant is indicated by the fact that the defendant Martin was acquitted while the other defendants were convicted.

IV.

THE JUDGE'S INSTRUCTIONS ON THE SUBSTANTIVE COUNTS WERE NOT PREJUDICIAL TO APPELLANT

(Answer to Appellant's Assignment of Error III).

The essence of the appellant's third assignment of error is apparently that her conviction should be reversed because in discussing the substantive portions of the indictment the judge, in his charge, did not make sufficiently clear that appellant was not charged with the substantive offense but merely with the offense of

conspiracy (App. Br. 43-46). The short answer to this contention is that the jury did not purport to find appellant guilty of any count other than conspiracy. Hence there seems to be no basis whatsoever for appellant's contention.

Appellant admits, moreover (App. Br. 45), that no exception was taken to the instruction in this regard and appellant's counsel suggested no qualifying instruction. Rule 30 of the Federal Rules of Criminal Procedure states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." Although Rule 52(b) permits an appellate court to notice plain errors or defects affecting substantial rights which were not brought to the attention of the lower court, nevertheless it is only where an error is seriously prejudicial that it will be noticed in the absence of objection. *Himmelfarb v. U. S.*, 175 F.2d 924, 9 Cir. 1949, *cert. den.* 338 U.S. 860. The court's instruction can hardly be characterized as seriously prejudicial to defendant in this case.¹⁹

¹⁹ Indeed, the charge appears to be more favorable to appellant than was necessary, if the judge required the jury to find her to be a participant in the scheme in order to convict her of conspiracy. A conviction can be had for conspiracy even though the substantive offenses have not occurred. See *Troutman v. U. S.*, 100 F.2d 628, 10 Cir. 1938, where a defendant's conviction only on a conspiracy charge in a mail fraud and Securities Act case was upheld. See also those cases affirming inconsistent verdicts set forth in footnote 11, *supra*. That the judge was too favorable to appellant can, of course, constitute no ground for reversal. See *U. S. v. Seavey*, 180 F. 837, 840, 3 Cir. 1950, *cert. den.*, 339 U.S. 979; *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150,

The instructions of the Court relating to the conspiracy count on which appellant was charged commenced with the statement, "Count XIII is the conspiracy count and I now desire to take up that count with you." (Tr. 1790). Thereafter, the instructions given on conspiracy are spread over nearly nine pages of the transcript, and instruct in long-approved language on the elements of that offense. In addition, as conceded by appellant (App. Br. 43), the Court in at least three places in its instructions made reference to the fact that Mrs. Davenport was charged only in Count XIII and cautioned the jury (Tr. 1774):

"Although the evidence introduced may be considered by you in connection with all the counts, each offense and the evidence applicable thereto should be considered separately as though no other offense was charged. The fact that you may find some or all of the accused guilty or not guilty, of one of the offenses charged should not influence your verdict with respect to any other offense charged."

It is submitted that the Court could not sensibly make reference to Mrs. Davenport in connection with every instruction given which did not relate to conspiracy. Its instructions, read as a whole, fairly and adequately distinguished her position from the other defendants.

219 (1940); *McDonald v. U.S.*, 89 F.2d 128, 137, 8 Cir. 1937, cert. den., 301 U.S. 697; *Wilkerson v. U. S.*, 41 F.2d 654, 656, 7 Cir. 1930, cert. den., 282 U.S. 894; *Sloan v. U.S.*, 31 F.2d 902, 905, 8 Cir. 1929.

V.

**THE COURT PROPERLY ADVISED THE JURY OF THE PLEAS
OF GUILTY BY CO-DEFENDANTS AND SAFEGUARDED
APPELLANT AGAINST IMPROPER INFERENCES
THEREFROM BY PRECAUTIONARY INSTRUCTIONS**

(Answer to Appellant's Assignment of Error V).

This court has recognized that as a practical matter, where certain of the defendants named in the indictment have pleaded guilty, the jury will inevitably learn this fact during the course of the trial. As pointed out by this court in *Nemec v. U. S.*, supra, at p. 661, where it was claimed that one of the co-defendants, Rector, had changed his plea from not guilty to guilty in the presence of certain jurors seated in the courtroom:

"Since it was inevitable that during the trial of the case it would be developed that Rector was named in the indictment and that he had pleaded guilty, we think that appellants' complaint on this point is wholly without merit, particularly in view of the fact that the court adequately cautioned the jury against permitting this circumstance to affect their determination of the guilt or innocence of the other defendants."

As stated in *U. S. v. Dewinsky*, 41 F. Supp. 149, D.C. N.J. 1941, where the trial judge mentioned that eight of the defendants charged in a conspiracy had pleaded guilty to it:

"The mention of these other persons, as will be seen from the language of the charge, was to get them out of the jury's minds and direct the latter's attention to the persons who had stood trial. Several of the defendants who had pleaded guilty had testified. All were identified in court from time to time by various witnesses. The problem for the jury

was, of course, not their guilt, but that of those who stood trial.

“It seems anomalous that that which was inserted for the defendant’s protection should now be made the basis of complaint.”

In *Holmes v. U. S.*, 134 F.2d 125, 8 Cir. 1943, *cert. den.* 319 U.S. 776, two of the defendants had entered pleas of *nolo contendere* in the presence of the jury and the trial judge had explained the effect of these pleas. The court stated, at page 130:

“Here again, though represented by counsel, no objection was made to the procedure and the court was not called upon to make any ruling. Certainly when no objection is interposed it cannot be said to be prejudicial error to permit a co-defendant to enter a plea of *nolo contendere* in the presence of the jury, especially when the court explains the effect of such plea. *Kelling v. United States*, 8 Cir., 121 F.2d 428.”

See also *U. S. v. Hartenfeld*, 113 F.2d 359, 362, 7 Cir. 1940, *cert. den.* 311 U.S. 647; *U. S. v. Joel Rosenberg*, 146 F. Supp. 555, E.D. Pa 1956; *Grumberg v. U. S.*, 145 Fed. 81, 86, 1 Cir. 1906; *U. S. v. Rollnick*, 91 F.2d 911, 917, 2 Cir. 1937; *Hines v. U. S.*, 131 F.2d 971 at 974, 10 Cir. 1942.²⁰

²⁰ Appellant cites *Nigro v. U. S.*, 117 F.2d 624, 8 Cir, and *Walker v. U. S.*, 93 F.2d 383, 8 Cir. Neither case is authority for appellant’s claim of reversible error here. In the *Nigro* case the assignment of error that the jury should not have been told of the co-defendants’ pleas of guilty did not appear to have been the basis for the reversal of the judgment of conviction, and the appellate court’s remarks were in the nature of an admonishment. Moreover, differing from the instant case where a precautionary instruction was given, there is no reference

The conjecture in appellant's argument that the knowledge by the jury of the guilty pleas made appellant's conviction a foregone conclusion is neither logical nor factual. As we have noted, Martin, one of the other defendants, was acquitted by the jury. Moreover, a reading of the record in this case shows the effort of all of the defendants to place responsibility for the crime on the shoulders of Errion while attempting to exculpate themselves. Errion's plea of guilty obviously would be consistent with this defense.

In announcing the guilty pleas the court cautioned the jury:

"The fact that they entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the indictments nor does it necessarily mean that each or any of the other defendants is guilty with them. In fact, it is no evidence of their guilt or innocence or that a crime was committed. (That is, the pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed.) The guilt or innocence of the defendants who are on trial must be determined by you solely by the evidence introduced at this trial." (Tr. 1750)

The record does not indicate that any objection was made to the court's reference to Errion's and Montgomery's pleas of guilty nor was the court requested at the close of the case to give an instruction in lieu of or supplementing that already given. In fact, having

in the report to such precautionary instruction in the *Nigro* case. In *Walker v. U. S.*, the court found no error and merely pointed out that it was "scarcely prejudicial" to receive a plea of guilty in the jury's presence where the defendant who pleaded guilty subsequently took the stand and testified.

awaited the jury's verdict on the claimed defense that Errion was the sole culprit, appellant can scarcely now claim prejudicial error to her because the court brought out in its remarks what the jury was bound to learn, that two of the scoundrels had admitted their crime.

A collateral point appears to be present in appellant's assignment of error, namely, that by the court's failure to advise the specific counts to which the pleas of guilty were entered it gave the impression that pleas of guilty had been entered as to all counts and hence that a conspiracy was proven. Appellant's argument appears to defeat itself, since in fact defendant Montgomery had pleaded guilty to conspiracy, and reference to this fact would, by appellant's logic, have established the crime of conspiracy without regard to Errion's plea. The complications which would have arisen had the court made specific reference to the counts to which the pleas of guilty were entered are manifest and would certainly have given rise to unwarranted speculation by the jury. The court's reference to the fact of the pleas of guilty in a general way, with the precautionary instruction, appears to have been the practical way of handling the situation, clearly following the expression of this court in the *Nemec* case.

CONCLUSION

Appellant had a fair trial lasting nearly twelve trial days. She showed herself an alert and capable witness, a woman active in business, social and civic affairs, though in advanced years. Appellee respectfully submits that seasoned experience and full maturity are not defenses for crime or conclusive of innocence.

Appellant had the motives of recovery of money from Errion and profit from the use of her corporate name and account, under circumstances which discredit her explanation. The record is clear that from her long association with Errion she knew of his reputation for fraud and knew that he was hiding his identity by using The Davenport Corporation as his "front". She was aware when she signed the contract with Mt. Hood that finances for the construction of such a grandiose plant would be a key requirement for its success and that her corporation was to "assist in the financing" and to do this "with due diligence". For an experienced business woman to sign a contract of this kind, inviting the investment of common workers to the venture, while at the same time acknowledging that she was told she would have nothing to do under the contract, was a badge of fraud. Appellant acted under circumstances and in a manner from which the jury could reasonably find and did find she acted as a participant in the conspiracy to execute a fraudulent scheme and to violate the securities laws, involving use of the mails.

The jury showed itself careful, devoted time to its

deliberations, and made distinctions between the defendants. The jury acted after competent instructions. There is ample evidence to support its verdict.

The conviction should be affirmed.

Respectfully submitted,

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United States Attorney
District of Oregon

ROBERT R. CARNEY
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United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court for the
District of Oregon.*

FILED

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INTRODUCTION

Appellant respectfully requests the court to reconsider its opinion that the indictment states sufficient facts to charge appellant with a crime based upon the additional authority not heretofore cited and set forth herein.

If appellant be imprisoned, only time will tell the extent to which this has been a capital case. Imprisonment has been adopted by society because it inflicts physical and mental punishment upon the imprisoned.

Appellant's resources in this regard have been almost exhausted by her age. The Court is in turn urged to exhaust every rational consideration of this indictment and the proof that could be adduced in support of it as it relates to appellant.

I.

Each accused who is to be imprisoned for conspiracy to commit mail fraud or fraud in the sale of securities, must himself be directly charged with the act of having devised or intended to devise a described scheme to defraud and with particular acts and intent setting forth his employment of that scheme in the sale of securities.

In *Stokes v. U. S.*, 15 S. Ct. 617, 157 U.S. 187, 39 L. Ed. 667, the Supreme Court had precisely before it the sufficiency of an indictment charging conspiracy to use the mails to defraud. The Court is requested to compare the language of this indictment with the language of the indictment in the cause at bar as it pertains to appellant, as well as to consider the views expressed in this decision by the Supreme Court upon the requisites of a conspiracy indictment.

In 157 U.S. 187 at page 188 the Supreme Court states as follows:

"We agree with the defendant that three matters of fact must be charged in the indictment and established by the evidence. (1) That the person charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the Post Office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such

person must have either deposited a letter or packet in the Post Office, or taken or received one therefrom.

“So also a conspiracy to commit such offense must state a combination between the defendants to do the three things requisite to constitute the offense. In this particular the indictment charges that the defendants ‘did then and there conspire, combine, confederate, and agree together to commit the act made an offense and crime by Section 5480 . . . that is to say, the said defendants conspired . . . and agreed together in devising, and intending to devise, a scheme and artifice to defraud various persons, firms, and companies out of their property, goods and chattels, and particularly to defraud, (here follows the names of certain individuals and firms,) and other persons, firms, and companies to the grand jury unknown, of their goods and chattels.’

“. . . the indictment continues as follows: ‘The scheme and artifice to defraud as aforesaid was *to be carried out* by each of said defendants representing himself to be engaged as a dealer in various kinds of merchandise . . . and the said defendants were *mutually to represent each other* . . . as financially responsible . . . *to be further effected* by ordering merchandise . . . having no intention . . . to pay for such merchandise . . .’ etc.

“We think this states with sufficient clearness the first requisite of an indictment under Section 5480, of a scheme or artifice to defraud. The allegation is not of what was actually done, but of what the defendants conspired and intended to do.”

Since the foregoing citation contains its own emphasis, appellant did not add any so as avoid confusion, but she wishes to restate two particular portions of this decision:

From the first paragraph:

“... the *person charged* must have devised a scheme or artifice to defraud.” (emphasis added) and

From the second paragraph:

“So also a conspiracy to commit such offense *must state a combination between the defendants to do the three things* requisite to constitute the offense.” (emphasis added)

Appellant respectfully submits that it is not possible to draw from this indictment that she *combined, confederated, and agreed in devising a scheme and artifice to defraud*. It is not possible, insofar as appellant is concerned, to find language in the indictment in the case at bar comparable with the following language of the indictment in the *Stokes* case, *supra*:

“That is to say, the said *defendants conspired . . . and agreed together in devising, and intending to devise*, a scheme and artifice to defraud various persons, firms, and companies out of their property, goods and chattels . . .”; (emphasis added)

The precise language of the first paragraph of the first substantive count in the case at bar charges the devising of the scheme, and the intention to devise the scheme, as follows:

“The defendant, Edgar Robert Errion, also known as Bob Errion, Glen R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, and Howard Martin, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Co-operative, hereinafter called ‘purchasers,’ by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the

pretenses, representations, and promises would be false when made.”

Appellant respectfully submits that *only those charged as above with having devised or intended to devise a scheme or artifice to defraud can be said to have combined and confederated to do so*. Or, to put it conversely and with reference to the proof, without allegations of fact that appellant devised and intended to devise such a scheme, it was not possible for proof to be adduced that appellant was one of a number of persons who devised and intended to devise such a scheme. The indictment in the case at bar cannot be reconciled with the statement of the Supreme Court in the *Stokes* case, *supra*, that the person charged with the substantive offense *must have devised or intended to devise a scheme or artifice to defraud* and that a conspiracy count must state a combination between *the defendants (all of them) to devise a scheme or artifice to defraud*.

* * * * *

Of course, what is stated in the *Stokes* case, *supra*, is nothing other than what the statutes involved require.

The Mail Fraud Statute, 18 USCA Section 1341, says the criminal is:

“Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . .”;

and the Securities Act, Section 77q(a), 15 USCA, says the criminal is:

“Any person (who) in the offer or sale of . . . securities . . . by the use of mails—

1. (Employs) any devise, scheme or artifice to defraud, or
2. (Obtains) money . . . by means of any untrue statement . . . or
3. (Engages in) any . . . practice . . . which operates . . . as a fraud or deceit upon the purchaser."

Admittedly, there can be no distinction in guilt, when a substantive offense is charged under either of these statutes, between the one who devises the scheme and the one who aids in the employment of the scheme, but the crimes to be charged, if they are to be found guilty of these statutes, *are the crimes denounced by these statutes*. The indictment must charge that the accused, *having devised or intending to devise a scheme or artifice to defraud*, used the mails in the course thereof, *or that he employed a scheme or artifice to defraud* in the sale of securities by the use of the mails.

Turning now to a charge of conspiracy to effect these offenses. First, a charge of conspiracy is limited to a conspiracy to commit an offense against the United States (Section 371, Title 18, USCA: "If two or more persons conspire either to commit an offense against the United States . . ."). It follows, therefore, that the indictment is necessarily limited in its description of the substantive offense to be described as the object of the conspiracy, to a crime denounced by a substantive statute of the United States; in this instance, *having devised and intending to devise a scheme or artifice to defraud*, using the mails in the course thereof, and *employing* a scheme or artifice to defraud in the sale of securities by use of the mails.

The conspiracy count, however, of this indictment charges that appellant, with seven others:

“did conspire, combine, confederate, and agree with each other to commit the following crimes . . . against the United States:

“violations of Section 1341 Title 18 . . . by using . . . the mails of the United States for the purpose of executing the scheme and artifice to defraud . . . *described in the first count* of this indictment, which is here and now realleged and incorporated by reference;”

“Violations of 77q(a) Title 15 . . . by employing said scheme and artifice to defraud . . . *as described in the preceding counts* of this indictment and hereby incorporated by reference;” (emphasis added)

(It is patent, of course, that a mere change of wording in the conspiracy count, when it charges a conspiracy to violate Section 1341, Title 18 USCA “by using and intending to use the mails of the United States for the purpose of executing the scheme” described in the previous counts, instead of charging a violation of that section by devising and intending to devise a scheme to defraud and using the mails in the course thereof, cannot and does not alter the actual nature of the substantive offense as denounced by the substantive statute that must be found as the object of the conspiracy.)

Now then—precisely what is incorporated into the foregoing allegations when the request for incorporation by reference is obeyed?

Appellant, Errion, Munkers, Bones, Lock, Wright, Montgomery and Martin are charged with having “conspired, combined, confederated, and agreed” to violate

Section 1341, Title 18, by combining to devise a scheme and using it to defraud; “that is to say” (to borrow from the language of the indictment in the *Stokes* case, *supra*) Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin, but not Appellant, did devise and intended to devise a scheme and artifice to defraud and with the intention upon their part that the mails be used; the said scheme “to be carried out” by Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin, and not Appellant, making various representations and controlling a corporation and having it engaged in transactions with the Cooperative by means of which they could siphon off large sums of money to their benefit.

Appellant, Errion, Munkers, Bones, Lock, Montgomery, and Martin are likewise accused of having “conspired, combined, confederated, and agreed” to violate Section 77q(a) Title 15, USCA, by combining to employ said scheme in the sale of securities by mail; “that is to say,” Errion, Munkers, Bones, Wright, Lock, Martin, and Montgomery, but not Appellant, having devised a scheme and artifice to defraud, employed said scheme and artifice upon purchasers in the sale of memberships in this Cooperative by the use of the United States mail in the fashion in which Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin are charged with having done so under the substantive counts.

The contradiction is obvious.

Contrast the language of the indictment in the *Stokes* case, *supra*, wherein “the said defendants conspired, combined, confederated, *and agreed together in*

devising and intending to devise, a scheme and artifice to defraud." Try as one may one cannot make the conspiracy count in the case at bar read that Errion, Munkers, Bones, Lock, Wright, Montgomery, Martin *and appellant*, combined, confederated, conspired, and agreed *to act together in devising and intending to devise a scheme to defraud, based upon this incorporation*, for according to the incorporated matter, appellant had no part in devising or intending to devise to the scheme.

Try as one may (and this is of particular importance because the Court has indicated that appellant's connection with scheme was in its employment) one cannot make this conspiracy count read that Errion, Munkers, Lock, Bones, Wright, Montgomery, Martin *and appellant*, combined, confederated, conspired, and agreed to *employ* this scheme in the sale of securities by mail, based upon this incorporation, for according to the incorporated matter appellant *is not said to have had any part in its employment*, as well as not being charged with having devised it.

Compare appellant's position with that of the seven other defendants, who are properly charged with having "*conspired, combined, confederated, and agreed*" *to act together in devising and intending to devise the scheme and artifice to defraud that each of them is charged with having devised and intended to devise by the allegations of the substantive counts.*

Appellant does not believe that the Court is in disagreement with her when she asserts that the conspiracy count must set forth in allegations of fact the

object and purpose of the conspiracy so that a court can ascertain that this object was the violation of a Federal Statute. As appellant understands this Court's present position, it is that the incorporation by reference accomplished this purpose.

But does it, as to appellant?

Perhaps it has been conceived that while the others might be charged with having combined in devising a scheme to defraud, appellant can be charged with having combined with them to carry their scheme into effect. Such *facts* might support a conviction for conspiracy when the latter is properly charged, but there is no such charge in itself. According to the statutes and the *Stokes* case, *supra*, one must be *charged with the acts constituting the conspiracy as a whole* even though one's actions may only be a part in effecting its object, and the charge must be couched as *personal acts* showing an *equal responsibility for an intention to accomplish the particular substantive offense involved*.

This indictment wants to charge appellant with equal responsibility for devising this scheme, but *actually places that responsibility elsewhere*. It wants to charge appellant with equal responsibility for employing the scheme but actually places *that* responsibility elsewhere.

Is not the nub of the matter this: There are no such things as acts and intent showing guilt of the intention to "conspire, confederate, combine, and agree" to commit a substantive offense, independent of and completely separate from, any acts or intent towards accomplishment of the substantive offense. Appellant contends

there is no such thing as an accused who has "combined, confederated, and agreed" to employ a scheme to defraud if the allegations of fact do not say how and when they personally employed it. How can there be allegations of fact to support proof otherwise? Particularly, when as here, the combination to defraud as to appellant's co-defendants is to be drawn from allegations of their individual acts of fraud alleged as coincident.

Of course, appellant must acknowledge that this court has already expressed itself as being of a similar view when it has so far upheld appellant's conviction upon the basis that the evidence showing her "connection with the scheme" was sufficient to show that she was one of the "parties to a conspiracy to defraud."

But are there allegations of fact by which her "connection with the scheme" was alleged against her?

The court has referred in its opinion to the allegations of the substantive counts that describe the use by the defendants accused thereby of a corporation known as the Davenport Corporation.

Of course, this court did not say these allegations of fact are charged against appellant, but is it fair, in this, a criminal prosecution, to point to these allegations of the substantive counts and to say to appellant that she should have been able to deduce therefrom that these acts were acts charged against her and committed upon her part? Can an issue of fact of criminal responsibility upon appellant's part truly be drawn from these allegations? Off hand, for example, is not a corporation a separate entity, and is not guilt personal?

Was she really supposed to conclude that while under the substantive counts her co-conspirators were charged in plain English with controlling this corporation; incorporation of this allegation into the conspiracy count charged her with controlling it? That while under the substantive counts her co-conspirators alone caused the corporation to enter into a contract with the Cooperative, when that allegation was incorporated into the conspiracy count, she was the one at fault?

If there were no conspiracy count, would this court countenance appellant's imprisonment under the substantive counts as they are charged? That is, without her being an accused and that count containing on its face no allegations of fact against her? What magic enables her to be imprisoned under them by virtue of their incorporation into the conspiracy count?

Must it not be acknowledged, in all fairness, *that controlling this corporation to an illegal end and causing it to execute a contract in furtherance of a scheme to defraud are the issues of wrongdoing in this regard, and that they are not charged against appellant?*

Are we not ultimately required to recognize that the allegations of the substantive counts are only allegations of fact charged against those charged therein, and that even when incorporated into the conspiracy count they can be no different than they are?

II.

Appellant's contentions further explained in the light of the Court's comment upon them in its opinion.

This court in its opinion states, apropos of appellant's arguments concerning this indictment:

"Appellant seems to argue that because she was not charged with any offenses in the first twelve counts of the indictment that she was therefore acquitted of those charges and that proof of the facts alleged therein cannot be used as establishing overt acts of the conspirators."

Since this is not what appellant intended to argue, she wishes to respectfully attempt to correct this impression.

Her argument was that it is uniformly recognized that an acquittal upon the substantive counts and a conviction upon a conspiracy count which incorporates the allegations of the substantive counts to provide its material allegations, is an inconsistent verdict, whether the acquittal be regarded as a true finding of fact as to the substantive counts from which an inference of guilt of the conspiracy count was to be drawn, and controlling over conviction for the latter, or an act of leniency on the part of the jury and thus not a true finding and not so controlling.

Appellant sought to establish the analogy between this inconsistency and the indictment in the case at bar where appellant is not charged at all in the substantive counts, even though, in like fashion, as in those cases, the conspiracy count relies upon the substantive counts for its material allegations.

Can appellant's statement that the conspiracy count relies upon the substantive counts for "material allegations" be challenged?

If she had in fact been charged in those counts, and acquitted of them, this court would have pointed out, as it has done in analogous cases in the past, that the acquittal was no more than an act of leniency on the part of the jury; that did not speak their true mind as to her innocence of the facts charged therein as shown by their conviction upon the conspiracy count, and that therefore the acquittal would not affect the conviction.

Does not an accused in such a case say to the Court: "I was acquitted of the substantive counts which charged me with doing those acts from which my guilt of the conspiracy counts was to be inferred, and therefore no such inference of my guilt of the conspiracy count can be made?"

And does not the Court, according to these decisions, reply: "It is true that in order to find you guilty of the conspiracy count the jury had to conceive of your being guilty of doing the acts charged against you in the substantive counts. They could arrive at your guilt of the conspiracy count in no fashion. Therefore, we hold that they did so find, their express finding upon the substantive counts notwithstanding, for that was an act of leniency they were not empowered to exercise."

Is there not legitimate cause, therefore, for appellant to say to this court that since she was not charged at all in the substantive counts, that therefore there were

no facts put in issue from which her guilt of conspiracy could be inferred? Is there not at least some apparent merit to her contention?

At least, no court has ever stated in the instance of such an inconsistent verdict; "That there is no matter of inconsistency presented; that whether the accused be found guilty or innocent of the substantive counts is completely aside from the matter under consideration; *that indeed, it makes no difference whether the accused himself is even charged at all with acts toward the accomplishment of a substantive offense*, it being sufficient only that somewhere in the indictment there be a description of a substantive offense for the use of the conspiracy count, whether it be described as the acts of others than the accused or the accused in fact be innocent thereof. The verdict of the jury embraces all things necessary to reach that verdict and once a verdict has been had, the actual allegations of the indictment can be said to pass from the picture. Only the practical question remains: Will the evidence support the verdict? And as to this, because of the very nature of the cause, a great deal must be viewed as being within the sound discretion of the jury."

This is not, of course, what the Courts have said, either in these cases or in those cases cited in appellant's opening brief where the Courts, including this one, have held that the facts of a substantive count are so deeply and genuinely involved in a conspiracy count as to render a trial and acquittal upon a substantive offense *res adjudicata* as to the facts as to a subsequent indict-

ment for conspiracy to commit that substantive offense, and a bar to such subsequent indictment.

Therefore, appellant contended that the allegations of the substantive counts set forth in the first paragraph of the first count, which describe the object and purpose of any alleged conspiracy to be covered by this indictment, were necessary and material allegations of the conspiracy count; allegations to be made, as such, against *any accused who was to be convicted of a conspiracy to effect them*. It was only in a secondary fashion that appellant objected to proof of those counts as overt acts; that is, that no proof of such overt acts upon the part of her co-conspirators would be admissible against her until a conspiracy agreement had first been proven upon her part. Since all of the allegations of fact as to the object and purpose of the conspiracy are in the substantive counts, and since proof is limited to evidence in support of allegations of fact, appellant contended that the point could never be reached under the substantive counts at which it could be said a conspiracy could be said to exist of which she was a part and at which proof under the conspiracy count could be adduced of any overt acts of her alleged co-conspirators set forth in the substantive counts.

* * * * *

It is stated in 15 CJS, Conspiracy, Section 82, page 1114:

“. . . Charge of a conspiracy to defraud necessarily involves a combination to accomplish a fraud.”

This is a truism with which there can be no disagree-

ment. Appellant, Helen A. Davenport, is not charged with *acts* showing she was a part of a combination to accomplish a fraud by these allegations. After the evidence is in, one learns that the accused could not have controlled the Davenport Corporation except by controlling her, and that they could not have caused it to execute a contract with the Cooperative, except by obtaining her signature, but one can learn nothing at all about Helen A. Davenport from these allegations of the indictment themselves.

In *U. S. v. Falcone*, 109 F. 2d 579, at page 581 (Second Circuit, 1940), the court states:

“ . . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.”

A prosecutor may have his regrets that he did not name appellant as an accused in the first substantive count or that he did not include her name in the body of that count by stating that the accused therein devised and intended to devise this scheme “together with one Helen A. Davenport,” when, with hindsight, he views the reaction of the jury to his evidence; but as the allegations of this indictment now read, appellant is one being swept “within the dragnet of conspiracy” as one whose association with the “main offenders” is apparently the negative inference that those who controlled this corporation and caused it to perform the

acts alleged (for their benefit) must have had either the guilty or innocent cooperation of the unknown persons who were this Corporation's officers (if they were other than themselves), to accomplish this. This circumstance renders this indictment such an "all comprehensive indictment" as to be staggering in its oppression.

* * * * *

Perhaps this is a helpful view of the matter. In *Deaton v. Commonwealth*, 295 So. 169, 220 Ky. 343, the Court divides the indictment into two parts, one of which it refers to as the *accusatory* part, and the other of which it refers to as the *descriptive* portion. The crime meant to be charged in that case, as here, was criminal conspiracy. In 220 Ky. at page 345 the Court quotes the indictment as follows:

"The accusatory language of the indictment says: 'The grand jury of Perry County, in the name and by the authority of the Commonwealth of Kentucky, accuses Matt Deaton and James Boggs of the crime of confederating, committed in the manner and form as follows, to-wit:'

The court then cites two Kentucky statutes that parallel the intent of the VI Amendment to the Constitution of the United States (. . . the accused shall enjoy the right . . . to be informed of the nature *and* cause of the accusation), and Rule 7 (c) of the Federal Rules of Criminal Procedure. One is quoted as follows:

"The indictment must be direct and certain as regards . . . the offense charged."

And the other of which as follows:

"The indictment must contain . . . a statement of the acts constituting the offense, in ordinary and

concise language, and in such manner as to enable a person of common understanding to know what is intended . . .”

Upon page 345, the Kentucky court states:

“The first requirement . . . we have . . . held . . . to be the *accusatory* part of the indictment, which is that part where the offense is named, and the second requirement should appear in that part of the indictment designated as its *descriptive* part . . . a good statement of the offense in the *descriptive* part . . . will not supply the failure to *name* the offense in the *accusatory* part . . . and, vice versa, a correct naming of the offense in the *accusatory* part of the indictment will not supply a defective statement of the acts constituting the offense in its *descriptive* part.”

So also this court in *Elder v. U. S.*, 142 F. 2d 199, states upon page 200:

“an indictment is a formal accusation of a person charging that he has committed an illegal act which is denounced by the sovereign as a crime. It must indicate the crime charged, and it must contain a statement of the essential elements of the indicated crime. It must include a recital of the acts alleged to constitute the offense in detail sufficient to bring them within the scope of the offense and *sufficient to inform the accused generally of the acts attributed to him* and the time of their commission so that he may adequately defend against the charge and so that he may be safeguarded against double jeopardy.” (emphasis added)

Granted that the indictment, being “in the usual form,” properly indicates the offense as charging that the nine defendants did “conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:”, where

in the case at bar, is the “descriptive part” of the indictment sufficient “to inform the (appellant) generally of the acts *attributed to (her) and the time of their commission* so that she may adequately defend against the charge?”

If, as stated in *Stokes v. U. S.*, *supra*, the indictment must state a combination between the defendants *to do* the three things requisite to constitute the substantive offense, or, if, as more particularly stated in 15 CJS, Conspiracy, *supra*, the charge of a conspiracy to defraud necessarily involves a combination to *accomplish* a fraud, where are the allegations of fact descriptive of her participation in a combination to accomplish a fraud?

To “combine, confederate, agree, and conspire” may correctly name a crime, and as the name of the crime, it may be the ultimate fact to be proven, just as murder, rape, and arson are likewise both the name of a crime and the name of the ultimate fact. But appellant needs no citation of authority that an indictment is defective that charges only that the accused “committed murder within this county and state,” with no allegations descriptive of the means by which he committed the crime, or the time and place and the name of his victim. Just because conspiracy is a crime that means the accused operated in conjunction with others, and others are likewise accused of the crime, doesn’t mean that the *accused’s own crime* can be described as to time, place, object, and means, completely and totally in terms of the acts and intent of those others. Somewhere, some place, the indictment must set forth facts descrip-

tive of the accused's own personal conduct beyond the mere name of the crime. He must have a fair opportunity to defend against *his own* conduct specified against *him*.

Please do not say to appellant that it was alleged as descriptive of the acts attributed to her that she caused the Davenport Corporation to execute a contract by means of which large sums of money were siphoned off to her benefit, or that the indictment alleged that she arranged for purchase of real property in that corporate name and later resold it to the Cooperative at a large profit to herself and her corporation.

Had such accusations been made by the indictment she could have defended against them by producing the witnesses for the prosecution who were in fact produced for the purpose of supporting the allegations that this contract was caused to be executed by others than herself and that the moneys paid pursuant thereto were delivered to and received by others than herself. She could also have offered the testimony the Government offered that her participation in the real property transaction was mechanical only. If she had been accused in the substantive counts, and the proof thereof had to be interpreted as set forth in the allegations of ultimate fact now appearing in the substantive counts as they are (i.e., that Errion, Munkers, Lock, Bones, Wright, Montgomery, and Martin were the ones *who controlled* this corporation, and that Errion, Munkers, Lock, Bones, Wright, Montgomery and Martin were the ones *who caused it to execute this contract*, who

caused it to siphon off sums of money for *their* benefit, etc.), she could have moved for acquittal upon those charges upon the ground that the evidence was either equivocal or contrary to her guilt, and that a conviction based thereupon would either be contrary to the evidence, or based upon speculation only.

In any event, her Counsel could have argued to the jury that she was innocent of these substantive counts upon the basis of such testimony so as to obtain their conclusion that she was not guilty of those counts for its important worth in considering whether or not she could be said to be guilty of the conspiracy count.

Can she possibly be said to have had a fair trial otherwise?

Perhaps the court feels that the jury would still have convicted her, but at least, when the jury entered the jury room, they would not have commenced their deliberations as to her upon the premise that it could be conceded that she was not charged with acts of participation leading to conviction of the substantive counts as such, and that even such a view of her participation in the conspiracy could be taken as that her co-conspirators were the only ones criminally responsible for what she did in furtherance of their accomplishment of the substantive offenses, but that she could still somehow be found guilty of being a "conspirator" or they would not have been asked to pass upon her guilt as a "conspirator."

III.

It is undeniable that appellant is not charged by this indictment in precisely the same fashion as her co-defendants. The issue thus presented is one of the utmost importance to the law of conspiracy and to criminal jurisprudence generally.

There are certainly only two ways in which the crime of conspiracy can be proven: either by direct evidence or by indirect evidence. Direct evidence would consist of oral or written testimony of the accused's agreement to participate in the commission of an offense. Indirect evidence consists of his actual participation in an offense from which an inference of his agreement can be drawn. Indeed, this Court, as has already been pointed out, has so far sustained appellant's conviction upon the basis of evidence showing her "connection with the scheme."

Appellant stands upon the proposition that her "connection with the scheme" was neither properly nor adequately alleged in allegations of fact charged against her, or even alleged at all.

The matter presented is one of the utmost importance to criminal jurisprudence. If appellant can be convicted of conspiracy upon proof adduced in the course of evidence being submitted to the jury to prove allegations of facts charging others with having devised and intended to devise such a scheme, a new doctrine in the law of conspiracy will be introduced.

In *Krulewitch v. U. S.*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, Mr. Justice Jackson states in the first paragraph of his concurring opinion as follows:

"This case illustrates a present drift in the federal law of conspiracy which warrants some further comments because it is characteristic of the long evolution of that elastic, sprawling, and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protests of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

Upon page 449:

"... even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."

And upon page 454:

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Upon page 446 there is cited the report of the Conference of Senior Circuit Judges, presided over by Chief Justice Taft, in 1925, as follows:

"We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no

preconcert of plan excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; . . .”

Appellant respectfully submits that every fault referred to by Mr. Justice Jackson and the report of this conference is embraced in the cause at bar.

The “uneasy seat” of the co-conspirator is extended in this cause to the indictment itself. Here, appellant does not merely sit by while evidence is adduced of the acts of others in order to color her own acts openly alleged against her; she must sit by while evidence is adduced of the acts of others offered to prove allegations of fact made against others in the first instance and purporting to cover the whole crime; the existence of a conspiracy, its object, those parties to it and the acts they committed from which their intent to combine to commit a wrongdoing is to be inferred; which, when proven against those so charged are then supposedly proven against her.

In the *Krulewitch* case, *supra*, conviction was reversed because there was admitted into evidence a conversation between the accused’s alleged co-conspirator and a complaining witness that was in the nature of an admission against interest but that occurred after the accused was indicted and long after it had to be acknowledged that the conspiracy, if any had ever existed, had terminated.

What can be said of appellant’s position in this trial? What is to be said of the evidence admitted to prove that Errion, Munkers, Wright, Bones, Lock, Montgom-

ery, and Martin devised and intended to devise, and to employ, a scheme and artifice to defraud in the fashion that their acts and intent are described in the allegations of the first paragraph of the first substantive count?

Was it evidence against appellant when introduced? Certainly not as such. If not, when did it later become evidence admissible against her? *How was the evidence adduced under the substantive counts that those defendants devised such a scheme "linked up" with itself under the conspiracy count so as to be expanded to embrace appellant?* As it was introduced, it was effective to prove, against those accused in the substantive counts, that they combined, confederated, and agreed as alleged in the conspiracy count, to act and perform as was proven against them under the allegations charged against them in the substantive counts; and indiscriminately, whether that evidence showed they were responsible upon the substantive counts either for actually having devised this scheme and having supervised carrying it into effect (Errion) or upon the basis that they only subsequently participated in its employment (Martin); but what allegations of fact could be proven against appellant as these allegations of fact against her co-defendants were being proven?

That she "combined, confederated, and agreed?" This may be the assertion of the conspiracy count, but by what acts alleged and proven against her, and against which she had opportunity to defend, in like fashion that acts were alleged and proven against her co-defendants under the substantive counts against which they had the opportunity to defend?

It is a physical fact, a matter of plain English, that this indictment charges appellant differently than her co-defendants. As to each of the others, the incorporation by reference requested by the conspiracy count incorporates allegations couched as acts of their own and of one another. As to appellant, the incorporation incorporates allegations couched only as the acts of her alleged co-conspirators.

It is logically impossible that this difference be *no* difference. There must be some necessary purpose served by the incorporation of these allegations or they would not have been incorporated. The incorporation cannot possibly serve that purpose as to appellant in *precisely the same fashion* as it does the others.

It may be contended that they serve that purpose in a *sufficient* fashion but it cannot possibly be contended that they serve it in the *same* fashion.

To determine whether or not they do in fact serve that purpose in a sufficient fashion, two things are to be ascertained: First, the purpose served as to appellant's co-defendants and second, the fashion in which this purpose is then served as to appellant. The purpose served as to her co-defendants was not merely to set forth overt acts, which could be attributed to any co-conspirator once the conspiracy was established. It was meant to incorporate the facts from which the existence of the conspiracy itself was to be established; the personal acts of each of the accused from which it could be inferred that a crime was intended to be committed by those acts and from which it could be further inferred for the purpose of the conspiracy count,

that each person so accused had necessarily combined with the others equally accused so as to effect a combination of the whole to accomplish the same. After all, each can be imprisoned only for *his own crime*. The conspiracy count incorporates the allegations of fact of the substantive counts so that there can appear in the conspiracy count the personal, individual acts showing an intent to devise a scheme to defraud and to employ it in the manner described, charge as such, upon the part of each person accused under the conspiracy count of having done the same in combination, confederation, conspiracy, and agreement with others, so that he can be found guilty of a crime he personally committed and charged as such against him.

The difference between the fashion in which this incorporation serves to fulfill that purpose for appellant's co-conspirators and the fashion in which it purports to fill that purpose as to appellant, is that there do not appear in the conspiracy count by virtue of this incorporation by reference, equal personal acts as to appellant, as there are to the others, showing an intention to devise such a scheme and to carry it into effect.

If this incorporation by reference was not meant to supply such allegations as to the alleged co-conspirators, what was its purpose? Certainly not merely to supply overt acts, for the courts have held many times that there is a distinction between overt acts and the allegations of the object and purpose of the conspiracy. The accused's agreement is his crime, described in terms of the accused's acts and intent to combine, confederate, agree and conspire to accomplish a substantive

offense. In the final analysis, each co-conspirator must be found *guilty of his own crime*.

Grant only that appellant's "connection with the scheme" had to be alleged in allegations of fact charged against her, even if only in the broad form of having her included as an accused in the first paragraph of the first substantive count, or in the particular form of having her charged with particular acts of wrongdoing by name therein, and it is apparent that there are no such allegations of fact contained in this indictment.

Deny that her "connection with the scheme" need be alleged and the floodgate is opened. Anyone can be tacked onto a conspiracy count, like an afterthought; their's not to fight the open battle that they committed no acts towards accomplishing a substantive offense in combination with others, for there are no allegations of fact charging them with acts towards the accomplishment of the substantive offense; their's only to wait till the prosecution has rested for opportunity to prove that they did not "combine, confederate, agree, and conspire" concerning the substantive offense of others; whatever that may be to the accused, to the jury, and to the court, under evidence adduced in the absence of such allegations against the accused and in the presence of such allegations against others.

This, appellant respectfully petitions the court, is not in accord with American justice.

Respectfully submitted,

DAVID M. SPIEGEL,
Attorney for Appellant.

No. 15689

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

FILED

AUG 13 1958

PAUL P. O'BRIEN, CLERK

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*Appeal from the United States District Court for the
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Introduction

The Government's Brief makes no attempt to come to grips with the propositions advanced in appellant's brief. It sets forth the indictment, but does not comment upon the actual allegations of fact it contains. The Government avoids altogether, either in argument or propositions of law, answering that which appellant charges as a basic flaw; that the only allegations of fact appear in the first paragraph of the first substantive count where they are charged as the acts of appellant's

co-defendants, with the obvious result that when these allegations are incorporated into the conspiracy count as its allegations of fact, the Government intends to prove appellant's crime by the deeds of her co-defendants.

Whether consciously or not, the Government's brief is a bold use of an old technique of debate: If you can think of no real answer to an argument advanced by your opponent, ignore the point and shift the controversy to some other ground. Of all the cases cited by appellant, for example, and though the number of cases cited by the Government is nearly half again as many, the Government comments upon only two of them, *Nigro v. U.S.*, 170 Fed. 2d 624; and *Walker v. U.S.*, 93 Fed. 2d 383, and these only in a footnote and in connection with appellant's Assignment of Error No. V, that it was error for the trial court to inform the jury that the defendants Errion and Montgomery had pleaded guilty.

Upon page 38 of its brief the Government states:

"It is difficult to ascertain the exact nature of appellant's complaint with respect to the Government's indictment."

Appellant has carefully reviewed the contents of her opening brief. She has concluded that she need not consent to being labelled incoherent. Further, from the contents of the Government's brief, it would seem that the Government has not really had any difficulty in ascertaining the exact nature of appellant's complaint; it has only been at a loss to ascertain an answer to it.

The Government's re-arrangement of the order of appellant's points is far too obvious. The effort to concentrate upon the evidence and ignore the allegations of fact under which it was adduced is patent.

Let us keep clearly in mind that Paragraph I of Count I charges the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin with having devised and intended to devise a scheme and artifice to defraud and that each and every allegation of the description of that scheme are described as the acts and deeds of these defendants alone. These defendants alone are charged with control of the Davenport Corporation, and in this indictment, none others; they alone are charged with having caused it to enter into a contract with Mt. Hood by means of which they converted a large portion of the moneys received for memberships to their use; they alone are charged with having used it to resell to the cooperative at a profit to themselves, real property purchased in the first instance with the cooperative's own money and through its own personnel.

Helen A. Davenport is not mentioned.

Let us abide by these allegations of fact and not insert therein that these defendants "together with one Helen A. Davenport" devised this scheme, or that these defendants "together with one Helen A. Davenport" caused the Davenport Corporation to enter into this contract, etc.

With this reminder, we can quickly appraise the

merit of the Government's brief by considering the language of its various headings.

I.

The Government's first argument is titled; "The evidence clearly established a scheme to defraud and fraud in the sale of securities and appellant's willful participation in a conspiracy to commit those crimes."

Patently, any evidence adduced to establish a scheme to defraud and fraud in the sale of securities was adduced under the allegations of the substantive counts, there being no other allegations of fact in the indictment. This scheme is not appellant's scheme, nor is this fraud appellant's fraud, for those allegations make no mention of appellant.

The Government's assertion that the evidence established appellant's willful "participation in a conspiracy to commit those crimes," is a mere rhetorical flourish. It is without any foundation whatsoever when the evidence is viewed in the light of the allegations of fact under which it was adduced and which it was intended to prove.

The subdivisions of this argument, the steps by which the Government intends to establish the foregoing, are as follows:

Subdivision A is that the "substantive offenses" were conclusively proven. Assuming that they were, all that has been proven is that appellant's co-defendants were guilty of the crimes charged against them in the substantive counts.

But let appellant emphasize what the Government desires to establish here as its first link in the chain of *her* guilt: That Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin are guilty of *their* crimes as charged in the substantive counts.

But note what occurs next. Since the Government has been unable to start with the assertion that *appellant's* participation in the substantive offenses was conclusively proven, the acts constituting participation in a "conspiracy" must be made to appear to be acts altogether different than acts constituting participation in a joint substantive offense.

Thus, Subdivision B of the Government's argument is that appellant's "participation in the *conspiracy* to commit the substantive crimes was established by the evidence."*

The "conspiracy" of which the Government speaks is patently not the "conspiracy" of which the law speaks. The conspiracy of which the latter speaks is a partnership in criminal purpose. By definition, agreeing to participate in a substantive offense is the subject matter of its conspiracy agreement and an inference can be drawn that an accused has participated in such

* How much more harmonious with the law, but not the facts, would have been the assertion that appellant's participation in the *substantive crimes* was sufficient to establish her participation in a conspiracy! Amongst the many other propositions advanced in appellant's brief and ignored by the Government is that this is very clearly the fashion in which the jury was to infer the guilt of appellant's co-defendants of the conspiracy count—and that by virtue of the nature of the evidence this was the *only* fashion in which guilt of this count was to be established in this cause.

an agreement from proof that he has participated in a joint substantive crime.

It is self-evident that the fact that appellant was neither charged as an accused in the substantive counts nor named as an actor in the body of those counts, was an insuperable obstacle to her conviction upon the conspiracy count under the theory upon which this latter count was prosecuted in this cause. It prevented an inference of her participation in a conspiracy agreement being drawn from such proof.

It is obvious that we are now chasing a will-of-the-wisp, but turn to Subdivision 1 of Part B of the Government's argument to see how far afield we are drawn. This subdivision is labelled; "Background of appellant's association with Errion." The Government seeks to establish, as its second link (the first was that her co-defendants were guilty of their crimes), that appellant knew or should have known from past association with Errion that the man was a swindler. As it set forth earlier; "as the evidence in the record will show, appellant well knew Errion's evil reputation," (Government's Brief, page 15). Or, as appellant herself has stated in her own brief, she was included as an accused in this cause because of what she should have known about Errion, and not because any proof existed that she had knowledge of his particular scheme.

And note this, as characteristic of the "case" against appellant: while what appellant should have known of the character of Errion from her past contact with the man is the first argument that comes to the Govern-

ment's lips, the evidence adduced of her past contact with him only appears in her own testimony in her "defense." Note the references to the Transcript in this portion of the Government's brief. They are all to appellant's own testimony and none are to the Government's case in chief.* As appellant has pointed out in her brief, in its case in chief the Government only sought to prove the allegations of the substantive counts. Appellant's "prosecution" under the conspiracy count never began until after the Government rested! Witness now how the Government advances as the first step in its case against appellant, after the guilt of her co-defendants, evidence that was not received in the cause until after that time. Appellant's "prosecution" thus consisted of nothing more nor less than of questioning appellant to see whether or not in hindsight the allegations of the substantive counts, already proven in one fashion (as alleged) should have been worded differently so as to have included, and not excluded, blame upon appellant for the wrongdoing described therein.

Now note subdivision 2 of this argument. It is headed "Participation by Appellant and Davenport Corporation in the Mt. Hood Scheme." What can be considered under such a heading other than the use of appellant and/or the Davenport Corporation (which, by the way, is not a named defendant) in the scheme set forth in the substantive counts so as to ascertain whether or not the allegations of fact set forth in those

* And what was that "past contact"? Errion mulcted her of an unstated amount in the "oyster bed fiasco," and of \$30,000.00 on the "Duniway judgment" (Government Brief, page 18).

counts have been proven against the defendants charged therein?

Let us note some of the details of evidence seized upon by the Government to see how true this has to be. The Government makes reference to a "steady concealment of his (Errion's) identity with this promotion." The charge that the Davenport Corporation was used as a cloak to hide Errion's connection with this enterprise is hindsight only. When the S.E.C. began investigating Errion's connection with this venture, any step that might possibly have had the effect of separating him from it became suspect as having been taken by him for just that purpose. It is impossible, however, to judge this man's conduct by the standards of a rational person. That he thought of the Davenport Corporation as a means of secrecy, is contradicted by the fact that at all times he dealt openly and for himself with reputable counsel (of whom anyone could have made inquiry), the incorporators, and the directors and management of the cooperative after it had organized itself from among its membership.

Consider the matter of copyright imprint. This was something done by Errion solely to gull appellant. Note how appellant speaks of them; she not only assumes that they had value, but that their value will be immediately apparent to her listeners at this trial (Tr. 1283-1430). Examine the material itself and it is obvious that these copyrights were worthless. What isn't in public domain can be equalled by any competent advertising firm!

Does the Government seriously contend that although salesmen of the Forest Products Company were selling these memberships by personal contact with prospective purchasers, that the latter might have desired to withdraw into a corner to search for the copyright imprint on this printed material and have elected to believe that whoever copyrighted it, was behind its representations? Does the Government seriously contend that this imprint would conjure up to a total stranger to appellant and her corporation *her* image, identity and standing in the community, as against the image of a printing firm headed by a man named Davenport, or located in Davenport, Iowa? There is not the slightest evidence whatsoever that appellant's name or standing was ever used to influence prospective members to buy these memberships, let alone evidence that these copyright imprints were ever explained towards that end to a prospective member.

Upon page 26 of its brief, the Government sums up a number of items of evidence as "also illuminating of appellant's relationship to co-conspirators Errion, Locke and Munkers." Under the actual allegations of fact of the substantive counts, they are equally illuminating of the relationship of Errion, Locke and Munkers to appellant, when considering whether or not these allegations have been proven against them.

Upon this same page the Government states, "Her testimony regarding this transaction gives the lie to her pretense that her interest in Davenport Corporation bank account was merely a clerical one for the convenience of Errion." Upon what basis does the Government

use such language? It is the Government's own allegation of fact that the Davenport Corporation had only a clerical interest in the moneys swindled from the members by the defendants charged in the substantive counts.

The Government here spends a number of pages of its brief arguing contrary to its own allegations of fact as proven by the testimony of its witnesses Piatt and Samuels in its case in chief; i.e., it queries whether or not those it has charged with criminal responsibility for the acts of the Davenport Corporation in its substantive counts are the only ones that should have been charged with criminal responsibility for its acts. This question may intrigue the Government, but it is outside the allegations of fact of its indictment.

The Government's brief then takes up the resale of the plant site to the cooperative. Upon page 38 the Government states that "the use of the Davenport Corporation to siphon off the Mt. Hood investors' funds by taking secret profits on real estate deals . . . was an important feature of the fraudulent scheme in this case and could not have been accomplished without the direct participation of Mrs. Davenport." Which, of course, is only a repetition of what is stated in the allegations of the substantive counts: That the defendants charged therein used the Davenport Corporation (which, of course, couldn't act except through some human agency—its officers) to effect this resale for purposes of making a profit for themselves.

The Government then recites the details of this

transaction which are precisely suited to the finding that the defendants charged in the substantive counts are guilty under the allegations of fact charged against them.

The Government concludes this recital by stating that "the testimony of appellant as to her knowledge of this unconscionable deal rings neither true nor plausible." Apparently, appellant's conviction is to be sustained, not upon the evidence adduced in the prosecution's case in chief to prove the allegations of fact of the indictment, but upon the basis that the jury was free to reject her explanation, given after the Government rested, that she was innocent of the crimes of her co-defendants described therein!

Under Subdivision C the Government argues that appellant's guilt or innocence was properly submitted to the jury. The Government first challenges the contention set forth in appellant's brief that direct evidence of actual knowledge of the fraud is the least evidence that will support an inference of an agreement to participate in the same upon the part of any given defendant. The context of this statement is appellant's assertion that the overall evidence was probably insufficient to submit the conspiracy count as to any but the defendant Munkers. Appellant first voices this point upon page 48 of her brief where she points out that the evidence in this cause was different than that usually observed in such cases. In her opinion there was nothing susceptible of the interpretation of being direct evidence that any of the alleged co-conspirators, other than Munkers, knew of their own knowledge that the specific misrepresenta-

tions set forth in the indictment were in fact false. None of the alleged co-conspirators took the stand to admit this or to level the same accusation against another accused. Appellant pointed out the distinction between a conspiracy whose subject matter, for example, was the handling of proscribed alcoholic beverage, creating an unlawful overt act upon the part of each person who dealt with it, and a conspiracy whose subject matter was fraud where each person who might make the statement that was in fact false, need not have actual knowledge of its falsity and, if they did not, could not have shared such knowledge with another.

In this light, none of the cases cited by the Government contradict appellant. In *Blumenthal v. U. S.*, 158 Fed. 2d 883, 9th Circuit 1946, Affirmed 332 U.S. 539 (Government's Brief, page 32), the accused sold liquor at prices in excess of the ceiling set by the Office of the Price Administrator, in itself an unlawful overt act.

In *Levine v. U. S.*, 79 Fed. 2d 364, 9th Circuit, 1935 (Government's Brief, page 33), Levine was a salesman in a scheme to sell worthless oil stock. Upon page 366 this Court states that Levine "knew perfectly well the stock was worthless," and outlines how, in selling it, he would first solicit customers for a purchase of General Motors Stock at far below market price, then state that that stock was not available and switch them to this worthless stock, sometimes without the customer's consent.

In *Allen v. U. S.*, 4 Fed. 2d 688, 7th Circuit 1924 (Government's Brief, page 33), the charge was a con-

spiracy to violate the National Prohibition Act and each of the accused dealt with obviously illegal goods. In *Pereira v. U. S.*, 347 U.S. 1 (Government's Brief, page 33), the two accused both made representations, proven false of their own knowledge, to induce their victim to purchase fictitious property.

In *Van Riper v. U. S.*, 13 Fed. 2d 961, 2r Circuit 1926 (Government's Brief, page 35), the accused was likewise proven to have made false statements, false of his own knowledge. The following is omitted from the Government's citation:

"His defense is that he was not aware of what was said in the circulars which went out from 15 Moore Street. It was on his first letter to Hedrick that the first circulars were issued, containing the false statement about casing in the 50 barrel well, and on his return he saw and talked with Hedrick. He was at times at the office at 15 Moore Street and attended some meetings there."

This sentence appears after the close of the Government's citation:

"In the case at bar his proven misstatements about the Wyoming well no doubt went far to overthrow his story, but in any case the issue is not for us."

In *Seeman v. U. S.*, 96 Fed. 2d 732, 5th Circuit 1938 (Government's Brief, page 36), the charges concern shipping forged bonds in interstate commerce. The appellant received a wire from an accomplice sending him some money and asking him to "ship immediately." Appellant pocketed the money and thereafter one Fein shipped the forged bonds. On his arrest the appellant

denied receiving the telegram or the money or that he even knew the others. When the contrary was proven, he then sought to explain the money as a payment upon a debt due him. The Government's citation is the Court's comment upon this circumstance.

What appellant had to say in her opening brief, she still maintains. The specific misrepresentations are alleged in the indictment. It is one thing to draw an inference that the defendant Munkers had knowledge of an agreement to perpetrate a fraud and agreed to participate therein from direct evidence of his knowledge of the falsity of his statement to the witness Jack that he knew the signature upon the letter purporting to come from the "syndicate" was genuine. This is direct evidence of his knowledge of the falsity of the alleged representations comparable to the evidence adduced in the cases hereinabove cited. It is another thing, however, to attempt to jump to the same inference from the fact that an accused made a representation that financing existed, in fact false, but without further evidence that he knew it to be false of his own knowledge and thus without evidence of his being in a position to share knowledge of its falsity with another and in this fashion to have engaged in a conspiracy with the latter.

In any event, it should be noted that the Government's argument here is to justify the submission of the conspiracy count as to appellant upon the ground that the evidence was sufficient in general when viewed from the position of all of the defendants. There is no effort here to resolve appellant's particular position that is so fully described in appellant's brief.

II.

We come now to the Government's argument that the indictment properly charged appellant with the crime of conspiracy. The argument under this caption, however, makes no effort to substantiate the indictment in view of appellant's criticism.

This argument commences with a statement that the language of Count XIII follows the usual form. Cases are then cited and it is advisable that we consider these to see whether any of them in fact bear upon the particular fashion in which appellant was charged in this indictment.

In *Nemec v. U. S.*, 178 Fed. 2d 656, 9th Circuit 1954 (Government's Brief, page 36), there were three defendants and five counts and the three defendants were charged in all counts. Apparently, since the Government cites this case, reference from one count to the other must have been used. However, had the Government intended to charge one of the accused in the conspiracy count but not in the subsequent substantive counts, they properly had the horse before the cart in this cause, for Count I alleged the conspiracy count and presumably described the same in allegations of fact, and the subsequent counts alleged the substantive offenses.

In *Donaldson v. U. S.*, 248 Fed. 2d 364, 9th Circuit 1957 (Government's Brief, page 36), Donaldson and his father-in-law were charged in ten counts concerning the sale of stock in a holding corporation and subscriptions in a health and accident insurance company. The last count charged conspiracy. The father-in-law died before

trial. Donaldson was found guilty of all counts but the conspiracy count. Upon page 36 this Court states:

“The indictment charged, in substance, that appellant and C. A. Donaldson, devised a scheme and artifice to defraud in the sale of . . .” etc.

Although the report does not reveal, apparently the Government is aware that reference was used, but if so it is the only analogy of this cause to the instant case.

In *Allen v. U. S.*, 186 Fed. 2d 439, 9th Circuit 1951, Certiorari denied, 341 U.S. 948 (Government’s brief, page 36), the report reveals to appellant that there were joint defendants who were apparently charged in all counts. (This Court states the “scheme described was that defendants would and did cause . . .”). Counts I to VI were substantive counts; Counts VII charged conspiracy. There was conviction only upon the latter. Again, apparently the Government is aware that reference was used in this cause, but otherwise it has no analogy to the case at bar.

Walter v. U. S., CCH ¶ 90851, 9 Circuit Apr. 11, 1958, is simply another case in which a conspiracy and substantive counts were joined, and where all defendants were charged in all counts, as appellant reads the report.

The next series of cases appear upon page 39 of the Government’s brief. No purpose is served by setting forth the content of the Government’s argument at this point; it is a hazard as what appellant might be “suggesting” that follows upon the Government’s statement that it has been difficult for it to ascertain the exact na-

ture of appellant's complaint concerning this indictment. Appellant's complaints are clear enough and can be found in her brief. Suffice it to say, therefore, that these cases are cited in support of this point: That even though the substantive count in a mail fraud scheme is defective, it may still serve the purpose of "reference" for a conspiracy count. The Government then cites *U. S. v. Monjar*, 47 Fed. Sup. 421, affirmed 147 Fed. 2d 916, 3rd Circuit, 1944, Certiorari denied 325 U.S. 859. In this cause, the District Court held Count I to be defective for failure to allege that the letter referred to therein was used for the purpose of "executing the alleged scheme and artifice to defraud" (47 Fed. Sup. at page 425). The Court of Appeals, however, sustained the substantive counts upon the ground that the mails need only be used in the course of the scheme and need not be vital to its execution. In view of this, this case seems a little aside the point. However, it should be noted in passing that the District Court properly held that guilt of a conspiracy to use the mails to defraud, does not require success and the actual commission of the substantive offense.

This decision has no bearing on the case at bar.

Touhy v. U. S., 88 Fed. 2d 930, 8th Circuit 1937; *Bell v. U. S.*, 100 Fed. 2d 474, 5th Circuit 1938; *U. S. v. Cohen*, 145 Fed. 2d 82, 2d Circuit 1944, and *Chew v. U. S.*, 9 Fed. 2d 348, the other cases here cited by the Government, stand only for the proposition that in a criminal indictment incorporation by reference can be used to borrow the allegations of fact of one count for

the purpose of supplying the allegations of fact of another.

This, of course, was conceded by appellant upon page 9 of her opening brief, being completely aside from the propositions she wished to advance.

Upon page 40 of its brief the Government seeks to use in its arguments the statement that "the fact that a Grand Jury has not indicted can in no way be construed to indicate that a person may not be guilty."

The Government cites *Alexander v. U. S.*, 95 Fed. 2d 873, 8th Circuit 1938, Certiorari denied, 305 U.S. 637. Here the appellant was indicted for the crime of conspiracy to commit a substantive offense with a group of named co-conspirators. Previously the Grand Jury had indicted those named as his co-conspirators for the crime of conspiracy upon a separate indictment. The appellant contended that not having been included in the previous indictment, the previous indictment was an admission of his innocence. The Court held that it was not. Patently, this cause does not stand for the proposition that the fact that the Grand Jury has not indicted can in no way be construed to indicate that a person is not guilty. It stands for the proposition that one can be indicted in a separate indictment for a joint crime and that one can always be indicted if he hasn't already been indicted. Obviously, until a person is indicted it will not be established whether they are guilty or innocent. This is precisely appellant's complaint in the cause at bar. She is not indicted in the substantive counts and therefore they present no issue of fact concerning her. That is

not to say that she could not have been an accused therein, or that she still cannot be accused of the same in a separate indictment. It is only to say that she is not accused of them in this indictment and that it therefore presents no issue of fact as to her.

But let us stop the film at this point, so to speak, and consider just exactly what sort of argument the Government is advancing here. It appears to be that the fact that appellant was not indicted in the substantive counts doesn't mean that she is innocent of the facts of those counts; therefore she can be found guilty of the facts of those counts even though not charged with the same.

Can this really be the Government's argument? Let us run through the Government's own language commencing upon page 39, in slow motion, interpolating, however, to make personal to this case what the Government states as a generality.

"If appellant's contention is that the indictment is defective on the basis that failure of the Grand Jury to charge her with violation of the substantive counts . . . precludes the *facts* therein from *being used against her* in the conspiracy count, it is based on false assumptions . . . of law. The fact that a Grand Jury has not indicted (her) can in no way be construed to indicate that . . . (she) may not be (found) *guilty* (of those facts without an indictment charging them.)" (Emphasis and parenthetical matter added).

Incredible as the foregoing may sound, appellant believes that it is in fact the Government's only answer to the specific charges appellant has levelled against this

indictment. It consists of a tacit acknowledgment that appellant is not charged with the facts of the substantive counts, a tacit admission that her conviction is based upon her having been found "guilty" of those facts, and the excuse that the lack of an indictment is not impediment to a conviction; it is not an admission by the Government that she is innocent and cannot be construed to indicate that she is not guilty!

* * *

Upon the same page the Government asserts that appellant assumes that an acquittal of the substantive counts would compel an acquittal on the conspiracy count; citing authorities contra here and upon the page succeeding (*Shayne v. U. S.*, 9th Circuit No. 1506, May 10, 1958, and *Coplin v. U. S.*, 88 Fed. 2d 652, 9th Circuit 1957). Appellant has not contended that an acquittal on the substantive counts would compel an acquittal on the conspiracy count. Appellant has in fact, pointed out that the jurisdictions are divided on this rule. (Appellant's Brief, page 35 et seq.). What appellant *has* contended, is that an acquittal upon substantive counts and a conviction upon a conspiracy count is an inconsistent verdict and recognized by all jurisdictions as such, whether they hold that such inconsistency voids the verdict or, as this jurisdiction, hold that it does not.

U. S. v. Cohen, *supra*, cited upon pages 40-41 of the Government's brief is in any event, a poor example for the Government's argument. The accused had to be acquitted of a substantive count of using the mails to defraud based upon the mailing of a particular letter because the evidence did not show that he was a member

of the conspiracy at the time it was mailed. On the other hand, however, the Court properly held that the charge of conspiracy to use the mails to defraud did not require completion of a substantive offense, nor, in this case, this particular mailing, and the latter conviction was upheld.

These are the cases cited in that portion of the Government's Brief intended to answer appellant's Assignments of Error Nos. I and IA.

The Government makes no comment upon appellant's proposition that she was entitled to be informed of the crime of which she was accused in allegations of fact and ignores the cases cited by appellant showing that neither the allegations of overt acts or the allegations of the acts of alleged co-conspirators, or conclusions of law, can supply such allegations.

Appellant's detailed analysis of this indictment is ignored.

Upon page 39 of its brief the Government states:

"If appellant is suggesting that the conspiracy count is inadequate in incorporating by reference the *scheme* alleged in Count I merely because appellant is not charged with a violation in Count I, she has mistaken the purpose of incorporation by reference, which is not to charge defendants with the crime alleged in the prior count but only to avoid repeating the description of the *acts* set forth in that count." (Emphasis added).

If it was meant to incorporate the "scheme" alleged in Count I—whose scheme was it? Or to get down to fundamentals, if its purpose was to avoid repeating the

description of the "acts" set forth in the first count—whose acts were they?

They were the scheme and acts of appellant's co-defendants. How can *their* acts either charge appellant with a crime or prove that she committed one?

III.

Whether or not it was an abuse of discretion for the trial court to deny appellant's motion for a separate trial is a question appellant presents. The law is clear; the matter was discretionary and appellant has not stated otherwise. The Court is referred to appellant's opening brief for her views upon this matter.

IV.

We turn now to the Government's answer to appellant's contention concerning the Court's instructions.

The Government asserts that the instructions upon the substantive counts were not prejudicial to appellant since she was only tried upon, and found guilty of, the conspiracy count. A cursory reading of appellant's opening brief, however, reveals that she does not contend that these instructions were prejudicial in this fashion.

Appellant points out both in her Assignment of Error No. IV (page 50) as well as in her Assignment of Error No. II (page 43) that the Court dealt with appellant and the facts by which she was to be judged guilty or innocent of the conspiracy count in its instructions upon the substantive counts. Indeed, the Government has tacitly admitted in its brief that she was in fact tried upon the "facts" of those counts.

The "prejudice" to appellant was that her guilt of the allegations of fact set forth in the substantive counts was not an issue in this cause. Appellant complains that the Court affirmatively submitted to the jury her guilt of the facts alleged against her co-defendants in the substantive counts and not that the Court submitted the guilt of her co-defendants upon such instruction and forgot to except her therefrom. This Court is referred to appellant's remarks upon this point in her opening brief.

V.

We turn now to the Government's answer to appellant's Assignment of Error No. V, that the Court erred in informing the jury that the defendants Errion and Montgomery had pleaded guilty.

In assigning this as error appellant assumed that it would be recognized that the facts of the case at bar were that the defendants Errion and Montgomery had pleaded guilty at a time prior to the trial date and that neither testified. Therefore the following language of *Nigro v. U. S.*, 170 Fed. 2d 624, 8th Circuit at page 632, seemed appropriate:

"The jury, however, should not be told that the defendants, the Conleys and the Darlings had pleaded guilty, unless they appear as witnesses and testify to their guilt."

In each of the following cases cited by the Government the error assigned was either that the plea was received in the middle of the trial in the presence of the jury, with or without comment upon the plea by the Court, or that the Court commented upon a plea taken outside the presence of the jury, but likewise the ac-

cused whose plea was remarked upon, appeared as a witness and testified: *Nemec v. U. S.*, supra; *U. S. v. Dewinsky*, 41 Fed. Sup. 149, D.C. at N.J. 1941; *Holmes v. U. S.*, 134 Fed. 2d 125, 8th Circuit 1943, Certiorari denied 319 U.S. 776; *U. S. v. Hartenfeld*, 113 Fed. 2d 359, 7th Circuit 1940, Certiorari denied 311 U.S. 647; *U. S. v. Joel Rosenberg*, 146 Fed. Sup. 555, E.D. Pa. 1956; and *U. S. v. Rollnick*, 91 Fed. 2d 911, 2d Circuit 1937.

In the following two cases the plea was taken before the commencement of trial but in the presence of prospective members of the jury panel: *Hines v. U. S.*, 131 Fed. 2d 971, 10th Circuit 1942, and *Grumberg v. U. S.*, 145 Fed. 81, 1st Circuit 1906.

It is interesting to note the language of the court in the *Grumberg* case, supra (apparently the earliest of the cases), where the court states that what transpired was not prejudicial:

“ . . . Because it is impossible to escape the belief that the fact that Burnham had pleaded guilty would come out in the course of the trial, and, also, that it would become a matter of common knowledge about the courtroom, which the entire panel would inevitably be affected by.”

Where the accused whose plea has been taken appears and testifies, it is obvious that the court's reference to his plea is inconsequential. Where, as in the *Nemec* case, supra, an accused changes his plea in the middle of the trial (he also testified in this cause), it is reasonable for a court to explain why an accused who has been at the counsel table will no longer be in attendance at the trial.

In the case at bar, however, there was no such circumstance that needed explanation. The mystery, if any, created by the absence of the defendant Errion was whether he was absent for reasons of innocence or reasons of guilt. The Court's remarks put the jury's mind at ease upon this point; one so palpably guilty had not escaped being brought to heel and "was safely in jail." If the situation required an explanation, it would have been sufficient to state that the cases of the defendants Errion and Montgomery had been disposed of at another time.

As to the prejudice that resulted, the court is referred to appellant's remarks in her opening brief.

Conclusion

Appellant can think of no better way of concluding this reply brief than by borrowing from the Government's conclusion to its answering brief.

On page 51 the Government states, apropos of the contract between the cooperative and the Davenport Corporation:

"For an experienced business woman to sign a contract of this kind, inviting the investment of common workers to the venture, while at the same time acknowledging that she was told she would have nothing to do under the contract, was a badge of fraud."

The precise language of Count I, Paragraph I that has reference to the execution of this contract is as follows:

“As a further part of said scheme and artifice, said defendants (Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin) would and did cause said Mt. Hood to enter into a contract with the Davenport Corporation, a corporation controlled by defendants. . . .”

Appellant submits that she needs nothing more than the foregoing allegation to conclusively establish that her motive and intent in executing this contract was not an issue of fact in this cause; that she was never apprised that it would be in issue; and that her conviction based thereupon is in violation of her basic right to be informed aforehand of the crime of which she is accused.

Perhaps now the Government can understand the exact nature of appellant's complaint against this indictment.

Respectfully submitted,

DAVID M. SPIEGEL,
Attorney for Appellant.

No. 15693 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS CURTIS BUSH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15693
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS CURTIS BUSH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging the appellant to be guilty of a single-count Indictment (see statement of case below) which Indictment was brought under the provisions of Section 2421 of Title 18, United States Code. [R. 415, 416, 427.]¹ The violation is alleged to have occurred in Los Angeles County, California within the Central Division of the Southern District of California.

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to

¹The abbreviation "R." refers to the Reporter's Transcript of the record.

review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

STATEMENT OF THE CASE.

An Indictment in one count was filed on January 3, 1957 charging the appellant essentially as follows:

That on or about November 1, 1956, appellant knowingly transported one Farlena Jo Hickey from Texas to the Southern District of California for prostitution, debauchery and other immoral purposes. On January 14, 1957, the appellant was arraigned in the United States District Court and entered a plea of not guilty.

On February 11, 1957, a hearing was had on defendant's motion to inspect documents and papers and on the defendant's motion for bill of particulars. The Court granted the defendant's motion to inspect all documentary evidence to be used in the case and ordered all said material to be made available to counsel for the defendant on that same day. The Court denied the defendant's motion for bill of particulars. The defendant made a motion for an examination of jurors on *voir dire* and for the names and addresses of the prospective jurors. The Court denied the motion without prejudice. [T. 3 and 4.]² This motion was renewed on February 12, 1957 and was again denied. [T. 5.]

The jury was impaneled on February 12, 1957 and the trial commenced on that date. On February 13, 1957, the Government rested. The defendant moved for a judgment of acquittal and the Court denied the motion.

²The abbreviation "T." refers to the Clerk's Transcript of the record.

The defendant then made a motion that the Government produce any and all “make sheets” or “rundowns” on Farlena Jo Hickey or Mrs. Watson. This motion was denied. [T. 9, and R. 269.] The verdict was returned on February 15, 1957. Judgment was entered on March 4, 1957. [T. 13.] On March 4, 1957, a motion was made for a new trial which was denied by the Court. [T. 18.] Notice of Appeal was filed on March 13, 1957. [T. 20-21.]

III. STATEMENT OF THE FACTS.

On February 11, 1957 a motion was made by the defendant for the names and addresses of the prospective jurors. [R. 11.] This motion was denied as indicated on the record of February 12, 1957. The Court stated the policy of the District Court and further ruled that the motion was untimely. [R. 12.] The defendant requested through counsel that he be allowed to personally *voir dire* the jury. Defendant's motion was denied. The defendant then made a motion to dismiss. This motion was also denied. The Court informed the defense counsel of the District Court's policy regarding *voir dire* of jurors: that it is by the Court and that counsel may submit any further questions which they desire to ask of the jurors and the Court will ask the questions. [R. 12-13.] During the selection of a jury, the prospective jurors were instructed as to the presumption of innocence and that it applied throughout the trial and they were asked if they understood this. [R. 15.] The Court again instructed the jury as to their function and that the Court was not interested in what their verdict might be. [R. 22.] At the outset the Court instructed the jury that any remarks of the counsel or the Court was not evidence and it was not to be considered by the jury as evidence. They were instructed that the jury is the sole judge of the evidence and the facts. [R. 30.]

Miss Hickey testified under her married name of Mrs. Watson, that she met the defendant in Dallas, Texas in August or September, 1956 at a drug store and thereafter had three or four dates with him. [R. 32-33.] The defendant suggested to Miss Hickey that she go to Beaumont, Texas, and work there as a prostitute. This conversation between the defendant and Miss Hickey took place in Dallas, Texas. The substance of the conversation was that Miss Hickey was to be taken to the house of prostitution, the Dixie Hotel, in Beaumont, Texas by the defendant. Miss Hickey was instructed how she was to act there and how she was to get into the hotel. The defendant and Miss Hickey went by plane from Dallas to Beaumont, Texas. [R. 33-37, 40-41, 43-44 and 55.] After arrival in Beaumont, Miss Hickey was taken to the house of prostitution, the Dixie Hotel. [R. 196.] Miss Hickey worked there as a prostitute for approximately three weeks and later returned to the house of prostitution. [R. 43-45, 51.] The defendant and Miss Hickey had a conversation in Dallas, Texas, before leaving for Beaumont, Texas in which conversation Miss Hickey was instructed by the defendant how she should perform her acts of prostitution; the prices to be charged; and the percentage which she would receive. [R. 34, 35, 38, 39, 40.]

While Miss Hickey was working as a prostitute in Beaumont, Texas, the defendant took Miss Hickey and his wife, Mickey, who was also a prostitute at the Dixie Hotel, to Houston, Texas [R. 49-50] for one or two days. After the trip the defendant returned Miss Hickey to the Dixie Hotel. [R. 51.] At the conclusion of her stay at the Dixie Hotel, Miss Hickey left the hotel with Mrs. Bush and met the defendant at a drive-in in Beaumont [R. 59-60] and the three of them traveled to

Houston and Dallas in the defendant's car. Enroute to Houston and Dallas, the defendant told Miss Hickey that he was going to take her to California and place her in a house of prostitution. [R. 64.] The defendant transported Miss Hickey from Texas to Los Angeles County, California. [R. 65, 66, 67.] The defendant placed Miss Hickey in a house of prostitution in San Pedro. [R. 76, 77.] Miss Hickey gave monies received from prostitution to the defendant. [R. 77, 78.]

Defense counsel, Mr. Graves, after repeatedly asking various questions pertaining to whether or not Miss Hickey had had any acts of prostitution before she met the defendant, asked the question, “. . . after you left your husband had you taken any trips in which you engaged in sexual intercourse with any man for any reward or gift.” [R. 97, line 7.] This question had been asked in several different ways and answered prior to this occasion. [R. 87, 88, 89, 90, 91, 92, 93, 95, 96, 97.] In response to this question the Court commented (referring to defense counsel), “He is having a good time, don't worry.” [R. 97, line 13.] Other questions were asked by the defendant's counsel as to Miss Hickey's place of work, her age and that she had given a false age in applying for work. At this time the Court stated that this line of questioning was immaterial. [R. 98, line 2.] Defense counsel then began to explain his theory of the case. Defense counsel explained that his theory was that the defendant's state of mind had been innocent throughout and that the defendant had been duped by the girl. The Court in response to this theory stated, “Do you mean to say that this defendant here is an innocent individual that has been duped by this young girl?” No objection was taken or made at this time. This statement of the Court was later objected to in chambers beyond the pres-

ence of the jury. The defense counsel asked for a mistrial. This motion was denied. [R. 105-106.] The defense counsel continued to cross-examine Miss Hickey concerning various phases of her life and her relationship with the defendant; the reasons why she became a prostitute; and the acts she would be performing as a prostitute. [R. 107-127.] During a colloquy between the Court and the defense counsel, the Court made the statement at page 127, line 20, "You may get a certain amount of personal satisfaction out of asking those questions but it doesn't tend to prove or disapprove anything in this case." Defense counsel has assigned this statement as misconduct by the Court. [R. 127-128.]

At the conclusion of the first day's testimony the Court instructed the jury to disregard the statements between the Court and counsel and that they were not to be considered as evidence. [R. 161-162.] On the second day of trial at page 194 during recross-examination of Miss Hickey, the defense counsel assigned as error and misconduct the following statement of the Court, "Counsel, every question you ask this girl surprises me that she hasn't broken down before under the very humiliating situation we have here." The Court instructed the jury at this time that they were to disregard the Court's comment and it was in no way to be a reflection upon the defendant. [R. 194, line 13.] Mrs. Bush testified that her husband, the defendant, took Miss Hickey to California. [R. 300.] Mr. Bush, the defendant, stated that he took Miss Hickey to California. [R. 322.] At the close of all the evidence the Court again admonished the jury that the comments of counsel and the Court had nothing to do with the merits of the case, or any disagreement had between counsel and the Court and was not to be considered as evidence. [R. 406, 407, 409.]

IV. ARGUMENT.

Introduction.

Two opening briefs have been filed: one by the appellant in pro. per. and the other by his attorney, Mr. Arthur Warner, Esquire. Each brief raises different points on appeal. However, the first point raised by the appellant pro. per. is basically the same as that raised by Mr. Warner in his brief. In his brief Mr. Bush, the appellant, raised the following four points:

1. "The Court committed prejudicial misconduct in comments made to counsel within the hearing in [sic] the presence of the jury and during these proceedings of the case which statements were duly objected to and to which motion of withdrawal of the jury were [sic] denied."

2. "The Court erred in instructing the jury on the credibility of the witness, Mrs. Watson—Farlena Jo Hickey—when the Court instructed the jury they could consider this witness the same as they consider [sic] any other witness in the instant case."

3. "That the Court erred in denying the defendant the right to have his counsel personally voir dire the jury. Said error [sic] compounded the error in refusing to give specific names and addresses of the jury referred to (motion filed February 20, 1957, No. 2554-CD, Notice of Motion for the Trial)."

4. "The Court committed prejudicial error and gross misconduct towards the counsel for the defendant on or about March 4, 1957, Los Angeles Central Division, United States District Court, Southern District of California, the Court made dictum (Jury was not present) 'Counsel you are a shyster—the only reason you took this case was to win it on appeal.'"

The three points urged by Mr. Warner in his brief for the appellants are as follows:

1. "The trial court committed prejudicial error by making comments in the presence of the jury which reflected upon the ability of the defense counsel, impugned the defense counsel, indicated the Court's disbelief in appellant's testimony and indicated belief in the prosecutrix's testimony."

2. "The trial court committed prejudicial error in permitting testimony of alleged misconduct by appellant and related to the charge in the indictment."

3. "The trial court committed prejudicial error when it denied appellant's motion to require the Government to produce 'make sheets' or 'rundowns' of the prosecutrix contained in the Government's file on the ground that such documents are confidential."

For the purpose of this brief Point One by Mr. Bush and Point One by Mr. Warner will be considered to be the same point. Thus the appellee will refer to them as six separate points only.

A. Alleged Misconduct of the Court.

The appellant in his briefs has alleged that certain statements of the trial court constituted prejudicial error. Specifically the appellant claims that such statements reflected upon the ability of defense counsel; impugned the integrity of defense counsel; indicated the trial court's disbelief in appellant's testimony; indicated belief in the "prosecutrix's" testimony; that the trial judge was adverse to the defendant from the start; that the appellant was hampered and restricted in the presentation of his defense.

At best, it is difficult to determine in the vacuum of appellate procedure, the effect of statements and conduct by the trial court upon the results of this case. And yet, that is first issue here presented.

Due to the imperfections of language and words, the meaning of one's mind is expressed also by other factors: facial expression; voice inflection; and gestures. Since these features were not recorded, one must look to the setting, surrounding circumstances, context and the entire proceeding to determine the true meaning of the alleged statements of the trial judge. *Ochoa v. United States* (9 Cir., 1948), 167 F. 2d 341; *United States v. Warren* (2 Cir., 1941), 120 F. 2d 211, 212.

The words of the trial judge are not be isolated for assessment, nor are specimens of his comments to be wrested out of context and measured against intriguing generalities, which would make otherwise inoffensive comment appear prejudicial. *United States v. Thayer* (C. A. Wis., 1954), 209 F. 2d 534.

Rule 52, F. R. Cr. P., any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

If we could have been at the trial proceedings, we could certainly have judged more perfectly the true meaning of the trial judge's statements. However, others were present from whose judgment of the time we may here consult. The party most likely to complain of error by the trial judge would be the defendant's attorney, since it is his duty to preserve the rights of the defendant.

It is significant to here note that the first thirteen underlined statements by the court which Mr. Warner sets forth in his brief as alleged error were not objected to at the

time they were made. (Mr. Warner's Br. for the App. pp. 4-9.)

This Court in the case of *Albert v. United States* (9 Cir., 1937), 91 F. 2d 461, said that allegedly objectionable matters in a criminal prosecution, not properly objected or excepted to in the trial court, would not be considered on appeal.

Apparently the only exception to this rule, as stated in *C. I. T. Corp. v. United States* (9 Cir., 1945), 150 F. 2d 85, is that the Court of Appeals will consider claimed error, not excepted to, only far enough to see that there has been no miscarriage of justice.

An appellate court should be slow to reverse a case for alleged misconduct of trial court unless it appears that conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent jury from exercising impartial judgment on the merits. *United States v. Glasser* (C. C. A. Ill.), 116 F. 2d 690, modified on other grounds, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680.

Conduct of trial judge in rebuking or punishing attorney during trial does not warrant reversal unless clearly prejudicial. *Newman v. United States* (C. C. A. Wash., 1928), 28 F. 2d 681, cert. den. 278 U. S. 839, 49 S. St. 253, 73 L. Ed. 986.

The first issue raised in determining this first point is, do the statements of the trial judge which were not objected to at the time of trial amount to a miscarriage of justice?

These thirteen statements occurred at varying intervals over 100 pages of transcript.

One of the statements was made beyond the presence of the jury. [R. 106, lines 14 to 17.]

Any remarks made beyond the presence of the jury could not have been prejudicial. To be prejudicial, the prejudice must develop in the mind of the party who holds the power of conviction. Here, that party is the jury. Obviously, no prejudice can arise where a statement was made which was not heard by the jury.

The state of the Court at page 101, lines 7 and 8, was not objected to, but rather defense counsel followed the statement by "Thank you, your Honor, I appreciate that."

The only statement among the first thirteen as set forth by the appellant really worth mentioning is the statement of the Court at page 99, lines 7-9. No objection was made at this time. An objection to this statement was later made in chambers. [R. 105, 106.]

At the beginning of this colloquy on page 98, a discussion developed as to what theory the appellant was defending his case. After defense counsel explained that he "should be permitted to show that the state of mind of the appellant was innocent throughout . . ." and that "the girl as a professional prostitute duped the defendant and tried to lure him into an entrapment in this very court on the grounds to get out of some trouble of her own." To which the Court asked the question, "Do you mean to say that this defendant here is an innocent individual that has been duped by this young girl."

The appellant contends that the jury received this statement as evidence of the Court's mind. This does not necessarily follow. The statement was in the form of a question. The jury had been listening to the defense counsel explain a hard-to-believe theory of defense. A seventeen-year old girl, who according to her just elicited testimony, had never been involved in prostitution, was supposed to have lured a much older, more experienced

man, whose wife was a prostitute at the same place where the witness was taken to begin her prostitution activities, into a trap culminating in the Federal Court.

The Court may have exhibited normal surprise. However, the Court's next statement was "If that's your presumption, go ahead." Thereafter, the appellant was permitted to continue to attempt to develop this theory. In the absence of a showing of anything further, how could such action be unfair and impartial?

In the case of *Lewis v. United States* (C. C. A. Mich., 1926), 11 F. 2d 745, 747, the trial court's questioning of defendant's petition on certain evidence introduced by the government during its case-in-chief, though not approved, was not ground for reversal.

The appellant contends generally that one of the Court's statements indicated the Court's disbelief in appellant's testimony. However, there is no specific statement as to which one does so. Certainly, the question asked by the Court regarding the defense theory of case cannot be construed as indicating disbelief in appellant's testimony since the appellant hadn't testified as yet nor had any defense witnesses testified. The same reasoning would apply to other statements of the Court which are assigned as error, since all of them, with the exception of the one made at the time of sentencing, occurred while defense counsel was cross-examining the victim, Miss Hickey.

Even if the statement alleged, whatever it may be, is construed to be a comment by the Court on the appellant's testimony, such was not improper.

Comment of the Court on facts and expressions of opinion adverse to the accused, were not error, where the Court clearly left questions to the jury. *Ng Sing v. United States* (C. A. Cal., 1926), 8 F. 2d 919. A statement

by the judge in his charge that he did not believe the testimony of defendant as to a fact, with further comment on the effect of the failure of courts and juries to properly function in enforcement of the laws, was not reversible error, where he distinctly told the jury that they were not to be controlled by his opinion, but must determine the facts for themselves. *Fulkerson v. United States* (C. C. A. Wash., 1924), 2 F. 2d 667.

A federal district judge may, in his discretion, express his opinion upon the evidence and credibility of witnesses provided that jury is made to understand that it is in no way bound by any such observations but is the sole judge with respect to issues of fact; and likewise he has the duty to admonish counsel when necessary, provided he does so in temperate language. (*United States v. Stayback* (C. A. N. J., 1954), 212 F. 2d 313.)

The record is replete with statements of the Court to the jury that it should disregard any statements between the Court and counsel and that the jury was the sole judge of the evidence. (See statement of facts.) Such action is in conformance with the rules laid down by the case.

Certain statements of the Court are alleged to be error in that it was an indication that defense counsel was taking undue time. (Mr. Warner's Br. pp. 12-13.) [R. 147, 148, 158, 179, 191, 227.]

It is conceded that these statements indicate that. However, it does not logically follow that this was prejudicial to the appellant. The Court at several places on the same occasions indicated that even though he was concerned with the amount of time being spent on cross-examination of the victim, he would give them all the time defense counsel wanted. This did not restrict or

confine defense counsel in cross-examination or in the presentation of his case.

District Court's comments, which exhibited no more than a natural impatience with extensive amount of time being consumed at trial of an uncomplicated case, were not so prejudicial as to justify reversal on grounds that judge's statements could be taken by jury as indicative of an attitude of prejudice towards defendant, his counsel or his cause. (*Pacman v. United States* (C. C. A. Cal., 1944), 144 F. 2d 562, cert. den. 323 U. S. 786, S. Ct. 278, 89 L. Ed. 627, reh. den. 323 U. S. 818.)

During further cross-examination of Miss Hickey, Mr. Graves continued asking questions regarding very personal phases of her life in an attempt to break her story. Counsel's questions were detailed, repetitious and most of them irrelevant. [R. 107-127.] Defense counsel had been asking questions concerning the acts she would be performing as a prostitute; how much money she would be making; her physical examination; her conversations with the appellant leading up to her becoming a prostitute. After unsuccessful attempts to get her to reveal conduct which would fit into the defendant's theory of the case, defense counsel would ask similar questions which were basically repetitious.

When the Court attempted to explain to counsel that this line of questioning was immaterial, delicate and embarrassing, a colloquy ensued between the Court and defense counsel. [R. 125, 126, 127.] On page 127, the Court said, "You have been asking her about the most delicate things you can ask a woman."

Mr. Graves replied: "Yes, your Honor. I want to show the whole story." Defense counsel here agreed that these were the most delicate things you could ask a woman,

and yet he wanted to persist and go into all the details. His attempt at impeachment had failed to take place by this time. The Court had permitted counsel to go into every phase of her activities or conversation in great detail. When it became apparent that further repetitious questions would not avail the progress of the trial, and when this should have been apparent to defense counsel, the Court made the alleged prejudicial statement. [R. 127, lines 20-22.]

The Court continued. [R. 128, lines 2, 3.]

Defense counsel objected to these remarks in the alternative. [Lines 4-6.]

At line 20, counsel asked, "May I be permitted to have a reasonable latitude to go into that?"

The Court: Certainly . . ."

Never at any time did the Court make any remarks which were directed towards the appellant in any way. No inferential remarks were made or alluded to in the course of the trial.

Other alleged prejudicial statements of the Court were basically of the same character, in that the Court was attempting to make counsel aware of the immateriality, uselessness, and futility of counsel's repetitious cross-examination.

After this particular colloquy, the Court instructed the jury that it should disregard the Court's comments and that it was in no way to be a reflection upon the appellant. [R. 194.]

The action of the Court in reprimanding defendant's counsel and unfavorably commenting on their conduct is not ground for reversal unless it involves palpable injury to accused or affects his substantial rights. (*Cook v. United States* (C. C. A. Tex., 1925), 4 F. 2d 517.)

If judge has been patient, heard fully and fairly, the defendant is required to show error which is reasonably prejudicial. (*Baker v. United States* (C. C. A. La., 1946), 156 F. 2d 386, cert. den. 329 U. S. 763, 67 S. Ct. 123, 91 L. Ed. 657, reh. den. 329 U. S. 829.)

A strongly reasoned case decided by this Honorable Court is that of *Shockley v. United States* (9 Cir., 1948), 166 F. 2d 704, 711, 712, reh. den. In that case, remarks of the trial judge directed toward defendant's counsel, were not prejudicial in view of the specific instructions that the jurors must wholly disregard Court's rulings and comments during the trial and that because the Court had admonished counsel, the jury should not draw any inferences therefrom.

The appellants contended that the attitude, demeanor, activity and expression of the trial judge were little less than shocking to a sense of justice.

This appellate court at pages 711, 712 said it could not "believe that these comments between court and defense counsel so misled and prejudiced jurors that they became partisans of the prosecution. We cannot abandon our faith in the capacity and desire of a Federal jury to avoid being mired in irrelevancies, and the record does not reveal that the jurors . . . were inspired to render a verdict not based entirely on the evidence admitted by the Court."

For the full effect of this opinion, this Honorable Court's attention is directed to page 712 of the opinion which in effect says that improper statements may be cured by appropriate instructions to the jury.

In the case at bar, the trial court made several specific instructions similar to the ones referred to in the opinion of the *Shockley* case.

See also:

Steinberg v. United States, 162 F. 2d 120, cert. den. 332 U. S. 808, 68 S. Ct. 108, 92 L. Ed. 386.

The facts of this case were little in dispute with the exception of the mental intent of the appellant. But from the basically uncontested facts, it may easily be inferred that the requisite intent was there present. Where guilt is clearly shown, some cases have held that no prejudice exists. (*United States v. Domres* (7 Cir.), 142 F. 2d 477, cert. den. 322 U. S. 723; *United States v. Krakower*, 86 F. 2d 111.)

Generally the test is whether or not the appellant has been prejudiced and has been denied his right to fair trial.

Brink v. United States (C. C. A. Ohio, 1932), 60 F. 2d 231, cert. den. 287 U. S. 667, 53 S. Ct. 291, 77 L. Ed. 575;

Hargrove v. United States (C. C. A. Okla., 1928), 25 F. 2d 258;

United States v. Katz (C. A. Pa., 1949), 173 F. 2d 116;

United States v. Echeles (C. A. 7, 1955), 222 F. 2d 144, cert. den. 350 U. S. 828, 76 S. Ct. 58, 100 L. Ed. 739;

United States v. Varlack, 225 F. 2d 665;

United States v. De Marie, 226 F. 2d 783, cert. den. 350 U. S. 966, 78 S. Ct. 436, 100 L. Ed. 839;

Withrow v. United States, 1 F. 2d 858;

42 L. R. A. (N. S.) 428;

Iva Ikuko D'Aquino v. United States (9 Cir., 1951), 192 F. 2d 338, 367;

Garber v. United States (6 Cir.), 145 F. 2d 966, 974.

Magen v. United States 24 F. 2d 325, holds as follows:

“In regard to the objection that the remarks of the trial court were such as to prevent a fair trial we are not persuaded that the constant reiteration by the attorney of his complaints against the judge was not calculated to prejudice the court, rather than the attorney or his client. The attorney was allowed to bring out on cross-examination any facts he might reasonably desire, and he called no witness except a deputy clerk of the District Court, who merely gave some unimportant evidence as to the record in his office.

“The proof of guilt was substantially uncontradicted and the reliance of the defense was on points of law rather than on the facts. To hold that personal altercation, having no real relation to the merits of the litigation, causes a mistrial, would be to reward a defendant for the shortcomings of his lawyer in a case where it is mere speculation to say he suffered any prejudice.”

And finally, in the case of *United States v. Dennis* (2 Cir., 1950), 183 F. 2d 201, cert. granted 340 U. S. 863, 71 S. Ct. 91, 95 L. Ed. 630, aff'd 341 U. S. 494, 71 S. Ct. 875, 95 L. Ed. 1137, we find these pertinent facts:

The trial was punctuated over and over again with motions for mistrial obviously for patently frivolous reasons. The judge found the action of the attorneys to be a deliberate and concerted effort to wear him down. The Court of Appeals found that such a concert would have been manifested in precisely the same form.

The judge, at times, rebuked the attorneys, he used language short of requisite judicial gravity; he warned if

their actions persisted, he would punish them when the trial was over. The court continued to instruct the jury that they were not to take what he said to the attorneys against their clients; the test applied there—did he weigh the scales against the defendants; did he confine defendants in presentation of their case?

“Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due.”

The facts of this case as applied to the cases cited above lead us to the conclusion that no prejudicial error was committed by the trial judge. He gave ample opportunity to cross-examine and to present the defense. He used moderate language. He made no remarks directed towards the defendant. Several times in addition to the final instructions, the court admonished the jury that it should disregard remarks of the court and counsel; that such was not evidence; that the jury was the sole judge of the evidence; that any remarks directed toward counsel should not be inferred to reflect in any way upon the defendant; that to do so would be grossly unfair; that by the court's remarks, it did not intend to express any view as to what verdict the jury should reach; that in fact, the Court was not interested in the verdict. In the face of this kind of record, it would be pure speculation to conclude that the comments of the Court had prejudiced his rights.

B. Alleged Error in Giving Instruction Re the Testimony of the Woman Transported.

Exception was taken to a portion of one instruction at R. 424, lines 14-21, “. . . that her testimony ‘may be viewed in the same light as any other witness.’” The defense counsel stated that this was “erroneous under the law that her testimony should be carefully scrutinized although she is not an accomplice, but she is a participant.”

Was this error to so rule? In a prosecution for violation of former Section 398 of this title, the refusal of requested charge that testimony of girl involved should be considered with great caution and subjected to the closest scrutiny by the jury was not reversible error although she had made statements to the F. B. I. inconsistent with her testimony at trial but it was corroborated in several material respects and the jury had ample warning that she was ill disposed towards the defendant. *United States v. Krulewitch* (C. C. A. N. Y., 1948), 167 F. 2d 943, reversed on other grounds 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790. The trial court and the appellant seemed to agree on the point that the witness, Miss Hickey, was not an accomplice. [R. 419, lines 12, 13.] The appellant believed that because of her participation, her testimony should be carefully scrutinized. The trial court had given an instruction to this effect earlier at page 415, lines 8-12.

“The jury should take into consideration the fact that Farlena Jo Hickey admits that she was involved in this transportation, in passing on her testimony. The jury should therefore carefully scrutinize her testimony in light of the view of all the circumstances.”

The desired instruction was here given.

The exception to the instruction given at page 424 then is only an exception if that instruction is inconsistent with

the first one so as to invalidate its effect. To determine this, all of the instructions relating to this witness and witnesses in general should be considered as a whole. 25 Fed. Dig. 407, and Pocket Parts pp. 75-76.

In addition to the instruction just mentioned above, the trial court gave these other instructions:

“However, you may consider the character of Farlena Jo Hickey in the same manner as you would consider the character of any witness who had testified in the trial of this cause for the purpose of determining whether or not she had told the truth.

“You are instructed that the woman transported is not an accomplice to her transportation whether she does willingly or unwillingly, and her testimony may be viewed in the same light as that of any other witness and it need not be corroborated if you are willing to believe it alone and without corroboration.” [R. 419, lines 7-17.]

Prior to this, the trial court gave the general rules by which all witnesses’ testimony should be weighed and evaluated. [R. 412, line 20, to p. 413, line 19.]

In instructions which stated that the jury should scrutinize with care the testimony of one they considered an accomplice, and which was followed by an instruction that the weight and credit to be given to the testimony of the person who has admitted a part in the commission of a crime is for the jury to decide, was proper. (*United States v. Echeles*, 222 F. 2d 144, *supra*.)

While the Courts of Appeals seem to be divided on the issue of whether or not the jury should be instructed to receive the testimony of an accomplice with caution, the majority seems, of course, to favor such an instruction. However, they hold that it is not reversible error to refuse

to give such instruction. (*Stoneking v. United States*, 232 F. 2d 385, cert. den. 352 U. S. 835, 77 S. Ct. 54, 1 L. Ed. 2d 54, cert. den. 354 U. S. 941, reh. den. 355 U. S. 852.)

A woman transported in interstate commerce is not an accomplice to her transportation. (*Levine v. United States*, 163 F. 2d 992.)

It necessarily follows that since Miss Hickey was not an accomplice, as defense counsel so intimated, the appellant was not absolutely entitled to an instruction cautioning the jury to weigh with caution Miss Hickey's testimony.

The case at bar is very close to the *Echeles* case, *supra*. Even though the jury there as here was cautioned in the use of the testimony of the witness, in both cases, the jury was instructed that it should decide.

This is what the alleged erroneous instruction in this case meant. It was merely a way of saying "nevertheless, you must decide for yourselves. You are to use the same tools of measurement in weighing the testimony of this witness as you would any other witness." The court had already given the jury the tools by which it should weigh and measure the testimony of all witnesses.

This was consistent with the basic principle that the jury is the sole judge of the weight and credibility of the witnesses. Any instruction restricting this function, for or against the appellant, would have been improper. (*Weiner v. United States* (C. C. A. Wis., 1936), 82 F. 2d 305, cert. granted, 298 U. S. 652, 56 S. Ct. 956, 80 L. Ed. 1380, aff'd 299 U. S. 92, 57 S. Ct. 79, 81 L. Ed. 58.)

Trial court has the duty to explain to the jury that they are the judges of the credibility of witnesses and to charge

them that every circumstance appearing in evidence, bearing upon such credibility, is to be considered in connection with witnesses' testimony in order that the jury may determine the weight to give testimony.

Under the general case law, we must conclude that the court's instructions were correct. (*Ghadieli v. United States* (9 Cir., 1927), 17 F. 2d 236; *Miller v. United States* (9 Cir., 1938), 95 F. 2d 492; *Jones v. United States* (C. A. Penn., 1956), 230 F. 2d 485.

C. Alleged Error of the Trial Court in Denying the Appellant's Request for the Names and Addresses of the Prospective Jurors and to Personally Voir Dire the Veniremen.

It is submitted that no Constitutional right of the appellant was infringed upon by the order of two separate District Court Judges on February 11 and 12, 1957, denying the appellant's request for the names and addresses of the prospective jurors and to personally voir dire the veniremen.

With the exception of capital cases such as treason and murder (18 U. S. C., Sec. 3432), we know of no rule or provision requiring the Clerk or the Court to divulge prior to trial the names of prospective jurors.

In fact, the law would seem to be that it is improper to make such divulgement. Prospective jurors should not be subject to neighborhood interview, etc. It is well established by reason of the Professional Ethics of the American Bar Association and by respectable authorities, that jurors should not be subjected to inquiry after they have arrived at their verdict. If it be the rule that jurors should not be harassed and investigated after the return of their verdict, all the more so should no investigation

be conducted prior to their service. For a discussion and collection of authorities on the subject of the impropriety of investigating jurors, subsequent to verdict, see those collected and discussed by Judge Mathes in *United States v. Schneiderman*, 106 Fed. Supp. 906, 925 (1952).

There is no violation of the Constitutional guaranty in the rule of this Court in refusing to furnish information on prospective jurors. The Sixth Amendment guarantees in criminal cases:

“ . . . to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, . . . ”

This does not require the providing of the names and addresses of prospective jurors. There is a presumption that jurors called are fair jurors and will decide a case upon the evidence and instructions of the Court. Rule 23, F. R. Cr. P., makes no provision for the supplying of the names and addresses of prospective jurors.

The rule that applies is Rule 24(a) of the Federal Rules of Criminal Procedure. The rule has never, to our knowledge, been held to be unconstitutional.

It is appellee's view that substantially all of appellant's contentions urged have been answered by a recent opinion of this Court. That case is:

Hamer v. United States (No. 15688), August 26, 1958, 259 F. 2d 274, rehearing denied.

We shall not repeat the arguments or authorities the Government presented in its brief in the *Hamer* case, nor here refer to the cases and comments of this Court in the *Hamer* opinion. We submit the authority of the *Hamer* case applies to the facts of this case.

Rule 24(a) with reference to examination of prospective jurors makes it discretionary with the Court to conduct voir dire examination itself or permit interrogation by counsel. A Federal Rule of Criminal Procedure has the force of a statute and hence will abrogate a contrary principle of common law. (*Rattley v. Irelan* (C. A. D. C., 1952), 197 F. 2d 585, 586.)

Another interesting aspect is presented by Rule 57(b), F. R. Cr. P., which states:

“If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.”

The Notes of the Advisory Committee on Rules, Note (b), states:

“One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever.”

“. . . it seemed best not . . . to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them either by local rules or usage. Among such matters are the mode of impaneling a jury . . .”

The trial court in this case followed the usual procedure of the United States District Court in this regard. (See Statement of Facts above). During the Court's voir dire of the jurors, counsel for the appellant was given every opportunity to submit questions to the Court which were then passed upon by the Court. All the questions so submitted by the appellant to the Court were submitted to the veniremen if the question was proper or if it had not specifically been asked by the Court before or in some

other way. The appellant made no objections to the questions submitted by the Court and took no exceptions for failure to submit any questions so requested by the appellant.

After the conclusion of the voir dire examination by the Court, the appellant, through counsel, stated he had no further questions.

It is concluded that the actions of the trial court concerning these matters, gave the appellant adequate opportunity to inquire of the veniremen in order to impanel a jury of his choice.

It is also concluded from the case law cited that the appellant had no right to know before the trial the names and addresses of the prospective jurors and that the denial by the trial court in this respect was not error.

D. Alleged Misconduct of the Court on March 4, 1957, at the Time of Sentencing, in Statements Made Towards Defense Counsel.

The verdict was returned by the jury on February 15, 1957, (See, Statement of Case, above). The statement alleged to have been made by the Court on the 4th of March, 1957, was not designated as a part of the original reporter's transcript of the proceeding. It is set forth in the supplemental record. [R. A2, A3.] This statement was made more than two weeks after the jury had returned its verdict.

To be prejudicial, it must affect the ones whose duty it is to ascertain the facts. The test applied in the *Schockley* case, *supra*, at pages 710, 711, was, did the conduct of the Court so mislead and prejudice the jurors that they became partisans with the prosecution. Since the facts had been presented and determined prior to the making of this

statement, it is inconceivable how any statement made by the Court at that time could have prejudiced the defendant.

The word prejudiced has been defined: "if reasonably calculated to erroneously affect the jury in reaching its verdict." (*Sonken-Galamen Corp. v. Hillman Tex. Civ. App.*, 111 S. W. 2d 853, 856.)

It is concluded that since the jury was not present, it could not be affected by any such remark and is therefore not prejudicial.

E. Alleged Error of the Trial Court in Permitting Evidence of Alleged Misconduct of the Appellant.

The appellee concedes that it is the general rule that evidence of the appellant's misconduct or criminal character is inadmissible to establish probability of guilt. (*Benton v. United States*, 233 F. 2d 491.)

However, the appellee contends that there are several exceptions to this rule:

(1) to impeach the appellant as a witness by a showing of a prior felony conviction; 24 Fed. Dig. 366-371.

(2) to show specific intent, knowledge, motive, design or scheme. (*United States v. Iacullo* (C. A. Ill.), 226 F. 2d 788, cert. den. 350 U. S. 966, 76 S. Ct. 435, 100 L. Ed. 839.)

The test which seems to be applied in such case is: was the evidence of misconduct relevant to the issues which must be proved before a violation of the law exists. (*United States v. Wall* (C. A. Ill.), 225 F. 2d 905, cert. den. 350 U. S. 935, 76 S. Ct. 307, 100 L. Ed. 816.)

In a trial charging the appellant with the interstate transportation of a woman for immoral purposes, the intent of the defendant is a vital issue.

Here, the other elements of the offense were not in issue. The whole defense was based upon the intent of the appellant that he had no such purpose in mind in transporting Miss Hickey from Texas to California.

His testimony was to the effect that he abhorred prostitution and that even though he knew his wife was a prostitute, he was constantly trying to get her out of the racket. [R. 321-392.]

His admissions that he had been a pimp [R. 385, 390] was basically the same evidence brought by the rebuttal witness, which evidence is here alleged to have been improperly received.

Thus, the real question may be decided without going into any of the foregoing exceptions. Since the appellant admitted on cross-examination and re-direct examination that he had been a pimp, how could the introduction of such evidence by the government on rebuttal, prejudice the appellant? Of course, the answer is that it cannot.

A fortiori, the fact that the appellant was a pimp goes to the question of intent at the time of the transportation. Since it would tend to shed light on this vital issue, it would be material. If a man is engaged in the business of pimping, it infers that a girl transported who is placed in a house of prostitution, is transported for the purpose of prostitution.

The appellant, on cross-examination, did not affirmatively deny or did not state that he had made such a statement as the government was tending to prove. Yet, taking his testimony as a whole, it would indicate that he was denying the statement. His closing remarks on cross-examination, "I don't remember the gentleman there." If he couldn't remember the gentleman—the F. B. I. Agent who heard the statement—he would possibly not remember making the statement to him.

For these reasons, it follows that the trial court did not abuse its discretion in permitting this evidence to be introduced.

F. Denial of Motion to Produce “Make” Sheets on Government Witness.

The motion was not made after the examination of the victim, Miss Hickey, as the appellant claims in his second opening brief, at page 29, lines 9-12. Nor was it made during the cross-examination of the witness. Rather, the motion was made at the conclusion of the Government’s case-in-chief. [R. 269.] Therefore, the motion may have been denied for being untimely.

The appellant contends in his second brief at page 30, lines 8-14, a right to cross-examine the defendant with respect to her criminal record. The appellee has no argument with this much of appellee’s contention. For impeachment purposes he may ask any witness regarding prior convictions of any felonies. However, during the cross-examination and recross-examination of Miss Hickey, no such questions were asked of her.

A witness may only be examined as to prior felonies or misdemeanors involving moral turpitude.

United States v. Howell, 240 F. 2d 149;

Steel v. United States, 243 F. 2d 712, cert. den.
355 U. S. 828, 78 S. Ct. 39, 2 L. Ed. 2d 41.

For impeachment purposes, evidence of witness’ arrest is inadmissible, but evidence of his conviction is admissible. (*Beasley v. United States*, 218 F. 2d 366, 368.)

There is no showing by the appellant that any “make” sheets actually existed or contained any exemplified copies of any felony convictions. Counsel for the defendant suggested that such “make” sheets contain “arrests or

police record.” [R. 269, lines 24, 25; p. 290, line 1.] At best, any such “record” is hearsay information and does not come within the ruling of the *Jencks* case, the *Andolschek* case or the *Beekman* case, cited by the appellant as their authority for this contention.

The *Jencks* decision is limited to statements or reports of the witness. “Make” sheet or “rundown” is neither a statement or report and hence does not come within this ruling. (*United States v. Jencks*, 353 U. S. 657.)

The documents which were the subject matter in the *Andolschek* case are substantially different than the “make” sheets in this case. There, the criminal prosecution was founded upon those very dealings to which the documents related and the contents of the documents may or may not tend to exculpate the criminality alleged.

Here, the “make” sheets are only hearsay evidence and would not be competent upon which to base a cross-examination or impeachment. The “make” sheets have no bearing upon the criminality of the defendant in the trial court. They do not relate to the appellant or to any element of the crime with which he was charged. Therefore, the critical distinction of the *Andolschek* case would not here apply.

The other case cited by the appellant as authority for this point is *United States v. Beekman, et al.* (C. A. 2d, 1946), 155 F. 2d 580. The holding of that court in relation to this issue was that records, showing that witnesses for the government against the defendant had been disciplined by the government agency which was prosecuting the action and were still in a business subject to the supervision of such agency, and thereby might be facile witnesses against other alleged offenders, were relevant on the question of bias of witnesses. Any such claim of privilege by reason of the confidential nature of the

records must be waived when a criminal proceeding is instituted and the records show the bias of the witnesses.

Three points were there controlling:

That the records actually existed;

That the evidence sought was records of a government agency, apparently otherwise admissible as official records; And that the evidence sought would show the basis for possible bias of prosecution witnesses. Such a showing would make the records relevant.

Here, the “make” sheets of the witness, Miss Hickey, were never shown to have actually existed. Indeed, the government’s attorney, Mr. Jensen, stated in open court that the witness had no arrest record. Defense counsel then said if such statements were made in open court by the government’s attorney, he would accept such a statement as a fact. The Court ruled that Mr. Jensen did not have to make such a statement. The defendant took no exception to this ruling. [R. 269, 270.]

The “make” sheets would not be admissible as competent evidence to show the arrest record of the witness since such “run-downs” are only records which various agencies: local, national, federal, state, submit to the F. B. I. when an individual is fingerprinted. It may be evidence that the agency submitted fingerprints to the F. B. I., but would be incompetent to show an arrest, or conviction or anything further.

Such an arrest record could in no way show bias towards the appellant.

It could not be relevant for impeachment purposes since a witness may not be impeached by evidence of prior arrests. (*Beasley v. United States, supra.*) Therefore, the appellant has not cited any authority to support this proposition.

V.
CONCLUSION.

From the rules and argument set forth above, it is concluded that the trial court committed no error in the trial of the appellant. In the event that it is considered by this court that the trial court committed error, it is urged that the error was harmless.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

T. CONRAD JUDD,
*Assistant U. S. Attorney,
Attorneys for Appellee United States of America.*

No. 15698 ✓

United States
Court of Appeals
for the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC 3 1957

PAUL R. GILBERT, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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FRANCIS L. TETREAULT,
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310 Sansome Street,
San Francisco 4, California,

For Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 36315

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation; WHITE COMPANY, a Corporation; FIRST DOE, and SECOND DOE,

Defendants.

PETITION FOR REMOVAL OF ACTION ON
GROUNDS OF DIVERSITY OF CITIZENSHIP

To the Honorable the Judges of the Above-Entitled Court:

Comes now States Marine Corporation of Delaware, a corporation, defendant in the above-entitled action, and files this, its petition for removal of said action from the Superior Court of the State of California in and for the City and County of San Francisco, in which it is now pending, to the United States District Court in and for the Northern District of California, Southern Division, held in the City and County of San Francisco, State of California:

1. The above-entitled action was commenced in the Superior Court of the State of California in

and for the City and County of San Francisco on March 8, 1957, the same being No. 466711, and is now pending in said court. Said defendant was served with a copy of the summons and complaint in said action on March 19, 1957, at San Francisco, California; that said action is one of which the District Courts of the United States have original jurisdiction.

2. That defendant States Marine Corporation of Delaware is a corporation organized and existing under and by virtue of the laws of the State of Delaware and was at the time of the commencement of said action and now is a resident and citizen of the State of Delaware and not a citizen of the State of California; that upon information and belief the plaintiff in this action at the commencement thereof was and still is a citizen and resident of the State of California; that upon information and belief as appears from the allegations set forth in paragraph II of plaintiff's complaint, all defendants named in said complaint are citizens of states other than California; that said action is of a civil nature, namely, an action for alleged damages for death alleged to have occurred on an American vessel in navigable waters of the United States.

3. That the matter and amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs.

4. That the controversy in this action is wholly between citizens of different states as aforesaid.

5. That your petitioner herewith files a bond with good and sufficient surety, conditioned that the defendant, States Marine Corporation of Delaware, will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that this cause was not removable or was improperly removed.

6. That attached to the original of this petition and made a part hereof is a full, true and correct copy of all records and proceedings in the Superior Court of the State of California in and for the City and County of San Francisco in said action.

Wherefore petitioner prays that this Honorable Court will cause said action to be removed from the Superior Court of the State of California in and for the City and County of San Francisco to the United States District Court in and for the Northern District of California, Southern Division, and that it will issue all necessary orders and process to bring before it all proper parties whether issued by the state court or otherwise.

GRAHAM, JAMES & ROLPH,

/s/ FRANCIS L. TETREAULT,
Attorneys for Petitioner.

Duly verified.

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 466711

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation; WHITE COMPANY,
a Corporation; FIRST DOE, and SECOND
DOE,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants and each of
them and for cause of action alleges:

I.

Plaintiff does not know the true names of defendants sued herein under the fictitious names of White Company, a corporation; First Doe, and Second Doe, and plaintiff prays leave to amend this complaint and insert herein said true names when the same shall have been ascertained.

II.

Plaintiff is informed and believes and therefore alleges that each and all of the defendants are corporations organized and existing under and by virtue of the laws of states other than the State of

California, but that said corporations have qualified to, and are doing, business in the State of California, and maintain principal offices and places of business therein, and particularly in the City and County of San Francisco.

III.

At all times herein mentioned the defendants did and now do own, operate, control and maintain the American vessel S.S. Lone Star State.

IV.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various long-shoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company to perform said work; that while and during the time said William J. Aldridge was performing said work aboard said vessel, he occupied the position of a seaman in that he was performing work traditionally of a seaman's character, and by reason thereof the defendants did owe to him the duty of providing a safe and seaworthy vessel, gear, equipment and appurtenances, and safe and seaworthy conditions of employment, including but not limited to the supervision and overseeing of his said work by an officer, to wit, the mate, of said vessel.

V.

Said William J. Aldridge did commence work as a longshoreman as aforesaid at approximately 7:00 o'clock p.m. of said day, and did continue his said work until approximately 2:00 o'clock a.m. thereafter; said work was performed in the No. 3 hold aft of said vessel; during the course of said work it was necessary from time to time for dunnage to be used therein, and for that purpose loads of dunnage, each weighing between one and two tons, consisting of large pieces of lumber of varying sizes and weights, strapped together by metal bands, were lowered into the said hold of said vessel; that at and shortly after the commencement of said work at approximately 7:00 o'clock p.m. of said day, the said William J. Aldridge and other longshoremen working together with him did request that they be supplied with band cutters or other means for breaking the said steel bands in order to free the pieces of dunnage so that said longshoremen could perform their tasks and duties in connection therewith, and said request was thereupon communicated to the defendants, including but not limited to the Port Captain employed by, and an officer of, said defendants, and a carpenter boss, likewise employed by the defendants; the defendants by and through their said agents, officers and employees did advise that no band cutters or other means or methods were available for cutting or breaking the said steel bands, but did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and method

provided by defendants to free said dunnage during the early portion of said work; that thereafter, when it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by said longshoremen were made through their foreman, supervisor and walking boss, but the defendants did fail to respond and did fail to provide or supply either persons or means by which the said bands could be cut or broken, and by reason thereof the only means and method remaining to said longshoremen by which such steel bands could be broken, was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the afore-said it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period of several hours, during all of which the defendants neither supplied any cutters, nor any persons to cut or break said bands, nor any officer of the vessel to oversee or supervise said operations, and in the course of such operations, at approximately 1:55 o'clock a.m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died en route by ambulance to a hospital.

VI.

The death of said William J. Aldridge was directly and proximately caused by the failure as aforesaid of defendants to provide him with safe and seaworthy conditions of work, and with a safe and seaworthy vessel, gear, equipment and place of work.

VII.

At the time of his death, said William J. Aldridge was in good health, was of the age of 52 years, had been employed as a longshoreman for approximately 30 years, was for a long time a steady member of a longshore gang and steadily employed, and was earning an average annual wage in excess of \$6,000.00.

VIII.

Plaintiff is the widow of said William J. Aldridge, having been his wife continuously since the date of their marriage on October 31, 1935; plaintiff, whose age is 55 years, was wholly dependent on her said husband for her support and maintenance; throughout the said marriage, plaintiff and her said husband had been a devoted couple, and by reason of the death of her said husband, plaintiff has been deprived of his care, comfort, love, society and support.

Plaintiff has also incurred burial and related expenses by reason of said death, and prays leave to introduce proof of the amount thereof.

Wherefore, plaintiff prays judgment against defendants and each of them, etc.

As and for a Second, Separate and Distinct Cause of Action Against Defendants and Each of Them, Plaintiff Alleges:

I.

Incorporates herein by reference as fully as though set forth at this point all of the allegations contained in Paragraphs I, II, III, V, VII and VIII of the first cause of action herein.

II.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various longshoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company, a stevedoring contractor, and by reason thereof said longshoremen, including said William J. Aldridge, were business invitees of defendants aboard said vessel.

III.

By reason of the matters and things heretofore alleged, the defendants and each of them were careless and negligent, and said carelessness and negligence directly and proximately caused the death of said William J. Aldridge as aforesaid.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$150,000.00 general damages, for burial and related ex-

penses incurred by reason of said death, for costs of suit incurred herein, and for such other and further relief as to the Court may seem just in the premises.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By RICHARD GLADSTEIN,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Plaintiff Above Named and to Messrs: Gladstein, Andersen, Leonard & Sibbett, Her Attorneys:

You and each of you will please take notice that on Monday the 15th day of April, 1957, at 10:00 a.m. or as soon thereafter as counsel can be heard, defendant, States Marine Corporation of Delaware, will move in the department of the United States District Court Judge on that day calling the Master Calendar to dismiss the action because the complaint fails to state a claim against said defendant upon which relief can be granted.

Dated: April 8, 1957.

GRAHAM, JAMES & ROLPH,
/s/ ROBERT E. PATMONT,
Attorneys for Defendant.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

This motion is made pursuant to Rules 7 (b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure. It is based upon plaintiff's failure in her complaint (1) to allege the violation of any legally cognizable duty owed by the defendant shipowner to the decedent, (2) to state a claim for recovery authorized under either the general maritime law or statute, and (3) to overcome the conclusion obvious on the face of the complaint that the death of plaintiff's decedent was not within the scope of any reasonably foreseeable risk arising out of an act or condition for which the defendant might be responsible.

I.

Plaintiff's complaint is predicated upon a shipowner's alleged duty to oversee and supervise the work of a longshoreman employed by an independent stevedoring contractor. It is necessarily so predicated because the complaint does not allege that plaintiff's decedent was killed as the result of any "operating" negligence or defect in the vessel's condition chargeable to her owners. Rather, from the face of the complaint it is apparent that plaintiff seeks recovery on the ground that the shipowner had an affirmative duty to prevent a longshoreman from selecting a method of doing his work which was obviously unsafe and calculated only to subject himself to a needless risk of serious harm.

No such duty exists. Plaintiff alleges that her decedent "was of the age of 52 years (and), had been employed as a longshoreman for approximately 30 years." This case does thus not fall under the general maritime rule that the owners of a vessel have a duty to warn and instruct a youthful and inexperienced workman, and the defendant had no duty to warn or instruct plaintiff's decedent against the obvious dangers created by his conduct.

McKenna v. Union SS Co.,
(N.D. Cal. 1914) 215 Fed. 284;

The P. P. Miller,
(W.D. N. Y. 1910) 180 Fed. 288;

The New York,
(2 Cir. 1913) 204 Fed. 764.

The duty of the shipowner to oversee and supervise cannot be found where, as here, the complaint shows that the decedent was an employee of someone else. That duty exists, if at all, only with respect to members of the crew and rests upon a master-servant relationship.

The State of Maryland,
(4 Cir. 1936) 85 F. 2d 944.

II.

Plaintiff gains nothing by designating her decedent a "seaman." As such he falls within the general maritime law that neither the shipowner nor the vessel is liable, in the absence of statute, for compensatory damages for injuries sustained by

mariners through the negligent acts of masters, officers or crew members in the giving of orders or the manner in which work is performed.

The Osceola,

(1903) 189 U. S. 158.

Nor has plaintiff stated a claim for recovery on account of "unseaworthiness." The position of plaintiff's decedent as an alleged seaman creates no greater rights based upon unseaworthiness than those accruing with respect to actual mariners.

Seas Shipping Co. v. Sieracki,

(1946) 328 U. S. 85;

Pope & Talbot v. Hawn,

(1953) 346 U. S. 406.

There is no maritime death statute protecting the widow of a deceased longshoreman or harbor worker. Absent such statute, plaintiff is within the general maritime law that confers no right whatever to recover damages or indemnity for the death of a seaman, whether occasioned by the unseaworthiness of the vessel or the negligence of the owners or members of the crew.

The Harrisburg,

(1886) 119 U. S. 199;

Lindgren v. United States,

(1930) 281 U. S. 38, 43;

Turchich v. Liberty Corp.,

(E.D. Pa. 1954) 119 F. Supp. 7, 11.

This action is presumably brought under Section 377 of the California Code of Civil Procedure. That statute permits heirs or personal representatives to maintain an action for damages for death caused by the "wrongful act or neglect" of another. It thereby confers no right of recovery based on the non-fault theory of liability for unseaworthiness.

III.

Plaintiff's complaint should be dismissed for the reason that it patently shows an absence of causal relation between the shipowner's conduct and the longshoreman's death. The defendant shipowner had no duty to warn and instruct as to the manner in which plaintiff's decedent performed his work. Even assuming the alleged failure to provide band cutters or other means for breaking the steel bands was a breach of some duty on the part of the owner, it is apparent from the complaint that the death of plaintiff's decedent resulted solely from his voluntary participation in conduct for which injury or death might reasonably be expected to result. Under such circumstances the vessel owner has no liability.

Jackson v. Pittsburgh SS Co.,
(6 Cir. 1942) 131 F. 2d 668.

The only expectable consequence of the alleged failure of the shipowner to provide some means of cutting or breaking the bands was that the longshoreman might suffer some inconvenience or delay.

Palsgraf v. Long Island RR,
(1928) 248 N.Y. 339, 162 N.E. 99.

The Palsgraf doctrine is a part of the maritime law.

Sinram v. Pennsylvania R. Co.,
(2 Cir. 1932) 61 F. 2d 767.

See also,

Pittsburgh SS Co. v. Palo,
(3 Cir. 1933) 64 F. 2d 198, 200.

For the reasons stated the complaint should be dismissed.

Respectfully submitted,

GRAHAM, JONES & ROLPH,

/s/ ROBERT E. PATMONT,

Attorneys for Defendant, States Marine Corpora-
tion of Delaware.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1957.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT
FOR DAMAGES

Plaintiff complains of defendants and each of them, and for cause of action alleges:

I.

Plaintiff does not know the true names or capacities, whether individual, corporate, associate or

otherwise, of defendants sued herein under the fictitious names of White Company, a corporation, First Doe, and Second Doe, and plaintiff prays leave to amend this complaint and insert herein said true names and capacities when the same shall have been ascertained.

II.

Plaintiff is informed and believes and therefore alleges that each and all of the defendants are corporations organized and existing under and by virtue of the laws of states other than the State of California, but that said corporations have qualified to do, and are doing, business in the State of California, and maintain principal offices and places of business therein, and particularly in the City and County of San Francisco.

III.

At all times herein mentioned the defendants did and now do own, operate, control and maintain the American vessel S.S. Lone Star State.

IV.

On or about the 25th day of October, 1956, at Pier 44 in the City and County of San Francisco, the said vessel was at berth, and certain cargo loading and unloading operations were taking place thereon, and in connection therewith various long-shoremen, including William J. Aldridge, were aboard said vessel as employees of Schirmer Stevedoring Company to perform said work; that while and during the time said William J. Aldridge was

performing said work aboard said vessel, he occupied the position of a seaman in that he was performing work traditionally of a seaman's character, and by reason thereof the defendants did owe to him the duty of ordinary care and the duty to furnish and supply adequate and safe tools for the performance of his work and a reasonably safe place in which to work.

V.

Said William J. Aldridge did commence work as a longshoreman as aforesaid at approximately 7:00 o'clock p.m. of said day, and did continue his said work until approximately 2:00 o'clock a.m. thereafter; said work was performed in the No. 3 hold aft of said vessel; during the course of said work it was necessary from time to time for dunnage to be used therein, and for that purpose loads of dunnage, each weighing between one and two tons, consisting of large pieces of lumber of varying sizes and weights, strapped together by metal bands, were lowered into the said hold of said vessel; that at and shortly after the commencement of said work at approximately 7 o'clock p.m. of said day, the said William J. Aldridge and other longshoremen working together with him did request that they be supplied with band cutters or other means for breaking the said steel bands in order to free the pieces of dunnage so that said longshoremen could perform their tasks and duties in connection therewith, and said request was thereupon communicated to the defendants, including but not limited to the Port

Captain employed by, and an officer of, said defendants, and a carpenter boss, likewise employed by the defendants; the defendants by and through their said agents, officers and employees did advise that no band cutters or other means or methods were available for cutting or breaking the said steel bands, but did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and method provided by defendants to free said dunnage during the early portion of said work; that thereafter, when it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by said longshoremen were made through their foreman, supervisor and walking boss, but the defendants did negligently and carelessly fail to respond and did negligently and carelessly fail to provide or supply either persons or proper means by which the said bands could be cut or broken, and by reason thereof the only means and method remaining to said longshoremen by which such steel bands could be broken, was to employ the hook secured to the winch, by inserting the same in the steel bands and thereafter raising the load of dunnage and attempting to break the steel bands by means of the weight of said dunnage, through raising the dunnage into the air and causing the weight thereof to break said straps; by reason of the aforesaid it was necessary to, and the said longshoremen did, use said method of breaking the dunnage straps for a period of several hours, during all of which the defendants negligently and

carelessly failed to supply any band cutters, or any persons to cut or break said bands, and in the course of such operations, at approximately 1:55 o'clock a.m., upon the breaking of the bands of one of said dunnage loads several heavy timbers did break loose and did fall upon said William J. Aldridge, directly and proximately inflicting upon him serious and fatal injuries from which he died en route by ambulance to a hospital.

VI.

The death of said William J. Aldridge was directly and proximately caused by the aforesaid carelessness and negligence of defendants.

VII.

At the time of his death, said William J. Aldridge was in good health, was of the age of 52 years, had been employed as a longshoreman for approximately 30 years, was for a long time a steady member of a longshore gang and steadily employed, and was earning an average annual wage in excess of \$6,000.00.

VIII.

Plaintiff is the widow of said William J. Aldridge, having been his wife continuously since the date of their marriage on October 31, 1935; plaintiff, whose age is 55 years, was wholly dependent on her said husband for her support and maintenance; throughout the said marriage, plaintiff and her said husband had been a devoted couple, and by reason of the death of her said husband, plaintiff has been

deprived of his care, comfort, love, society and support.

Plaintiff has also incurred burial and related expenses by reason of said death, and prays leave to introduce proof of the amount thereof.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$150,000.00 general damages, for burial and related expenses incurred by reason of said death, for costs of suit incurred herein, and for such other and further relief as to the Court may seem just in the premises.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ RICHARD GLADSTEIN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 1, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Plaintiff Above Named and Messrs. Gladstein,
Andersen, Leonard & Sibbett, Her Attorneys:

You and each of you will please take notice that on Monday the 27th day of May, 1957, at 9:30 a.m. or as soon thereafter as counsel can be heard, defendant States Marine Corporation of Delaware will

move the above-entitled court in the court room of the Master Calendar Judge, to dismiss plaintiff's First Amended Complaint on file herein on the ground that it fails to state a claim against said defendant upon which relief can be granted.

Dated: May 14, 1957.

GRAHAM, JAMES & ROLPH,
/s/ ROBERT E. PATMONT,
Attorneys for Defendant.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff's First Amended Complaint is based solely on negligence. It is nevertheless still subject to the motion to dismiss heretofore made by the defendant shipowner and now renewed. The amended complaint should be dismissed because it fails to allege facts sufficient to show the violation of any duty owed by the shipowner to the deceased longshoreman. Even if negligence on the part of the shipowner were assumed, it is apparent on the amended complaint that as a matter of law no causal connection would exist between the death of plaintiff's decedent and the shipowner's alleged negligence.

The alleged fault of defendant shipowner is its asserted failure to provide band cutters or some other means to break the metal bands strapped

around a load of dunnage. A complaint predicated on the existence of such a duty wholly misconstrues the nature of the relation between a vessel and those who perform the work of loading and unloading her cargo pursuant to an independent contract. The maritime law imposes no liability upon a vessel or her owners for the failure to provide implements which by their very nature are not part of the ship's equipment, tackle and machinery but are instead implements which are peculiar to the loading and unloading work of which the stevedores are in control.

Signore vs. S.S. Ferngulf

(SDNY 1952) 103 F. Supp. 677;

Riley, ADMX. vs. Agwilines,

Inc. (1947) 296 NY 402, 1947 AMC 1038.

The amended complaint shows that plaintiff's decedent was employed as a longshoreman by the Schirmer Stevedoring Company, an independent stevedore. Defendant's duty to provide plaintiff's decedent with a reasonably safe place to work did not, in the absence of a specific agreement, extend to the provision of band cutters for the use of the longshoremen in breaking the dunnage straps or in any other way to supervision of the manner in which this operation was performed. That operation was part of the business of loading and unloading the vessel and as such was the business of the stevedoring company. The amended complaint is therefore void of allegations showing breach of duty or negligence.

The amended complaint is subject to dismissal even though it is assumed that the shipowner was negligent. Recovery based upon negligence will not be allowed against the shipowner in maritime cases unless its conduct is the "proximate cause" of the harm in question.

Hawley vs. Alaska S.S. Co.

(9 Cir. 1956) 236 F. 2d 307.

Following the doctrine of *Palsgraf vs. Long Island R.R.* (1928) 248 NY 339, 162 NE 99, it is recognized in cases of this kind that liability attaches only if the injury or death may reasonably have been expected to follow from the defendant's negligent act or omission. Recovery is denied where the damage complained of is not within the scope of any reasonably foreseeable risks created by the conduct of one against whom liability is sought.

Sinram vs. Pennsylvania R. Co.

(2 Cir. 1932) 61 F. 2d 767;

See also,

Pittsburgh S.S. Co. vs. Palo

(3 Cir. 1933) 64 F. 2d 198, 200.

If in fact the shipowner was negligent in failing to provide band cutters, the risks created by such negligence fall far short of including a longshoreman's death. The risk was only that the longshoremen might suffer some inconvenience or delay in finding another safe way to do their job. In such circumstances the shipowner would be responsible

for any losses occasioned by the delay. But this could not mean that the shipowner should have foreseen, and be thus accountable for, the death of plaintiff's decedent. His death occurred not because there were no band cutters, but because the longshoremen chose to shortcut their own safety to perform their work in an obviously foolhardy manner.

Vileski v. Pacific-Atlantic SS Co.

(9 Cir. 1947) 163 F. 2nd 553.

What caused the death is apparent on the amended complaint. Plaintiff alleges that her decedent was killed by falling dunnage when he and other members of his longshore gang undertook to break the metal bands strapped around a load of dunnage by placing a cargo hook in the bands and raising the load into the air. Raising a load of dunnage weighing between one and two tons by means of straps which the longshoremen knew—indeed intended—would break, was an improper, careless, and dangerous use of the ship's gear for which its owners are not liable.

Freitas v. Pacific-Atlantic SS Company

(9 Cir. 1955) 218 F. 2nd 562;

The Daisy

(9 Cir. 1922) 282 Fed. 261.

The voluntary participation by plaintiff's decedent in this method of breaking the dunnage straps was the sole cause of his death. By his own volition he created a condition from which injury or death could reasonably be expected to result. It

is beyond the breadth of reasonableness that a ship-owner who, albeit negligently, fails to provide band cutters should be liable for the consequences of an alternative method of breaking the bands which plaintiff's decedent chose in reckless disregard of his own safety.

Jackson v. Pittsburgh SS Co.

(6 Cir. 1942) 131 F. 2d 668.

The facts of the Jackson case, *supra*, are parallel to these. There the court affirmed an order dismissing the complaint for failure to state a justiciable claim against the defendant in either of two causes of action. The complaint alleged that the plaintiff was injured when he jumped about six feet from the deck of the vessel to the dock. Plaintiff alleged that there was no ladder nor other means of egress from the ship; that he requested a member of the crew to place a ladder over the side so that he might go ashore; and that this request was refused. In a *per curiam* opinion the court said (131 F. 2d @ 669, 670):

“Assuming that the failure of the ship to provide a ladder at the time and place indicated was a breach of duty on the part of the owners and therefore, negligence, we are unable to perceive that such negligence bore any causal relation to the injuries of the plaintiff which followed. The court was right in dismissing the first cause of action.” (For negligence.)

“The plaintiff was not compelled to jump from the ship. The only expectable injury that he might have suffered from the failure to provide a ladder, would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured in the service of the ship. The court was likewise right in dismissing the second cause of action.” (For maintenance and cure.)

Plaintiff's position is no more favorable than that of the seaman plaintiff in the Jackson case. On the authority of that case, and for the reasons herein stated, plaintiff's first amended complaint should be dismissed.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,

/s/ ROBERT E. PATMONT.

Certificate of service by mail attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

The allegations of the amended complaint herein may be summarized as follows:

Plaintiff's decedent was a longshoreman who, on October 25, 1956, was employed in that capacity aboard the SS Lone Star State. Decedent and his fellow longshoremen were engaged in loading cargo into the holds of the vessel, the particular cargo being loaded requiring large quantities of dunnage. The dunnage was brought aboard said vessel by the longshoremen in large bales held together with steel straps. Shortly after the longshoremen commenced work in the morning, they requested the agents and employees of defendant to either supply them with a band cutter, or that they send a ship's carpenter into the hold of the vessel to break or cut the bands. Pursuant to this request, the ship's carpenter was sent into the hold for that purpose for the first few hours of the day's work. However, later on in the day it again became necessary to break the bands holding together a bale of dunnage, but despite request made to the agents and employees of the defendant, they failed and neglected to again send the ship's carpenter into the hold or to furnish a band cutter for the use of the longshoremen. Because of such failure and neglect on the part of the defendant, the longshoremen were compelled to devise their own means of breaking said bales of dunnage

and in doing so the decedent was struck by pieces of dunnage and killed.

The complaint further alleges that the death of decedent was directly and proximately caused by the negligence and carelessness of the defendants in failing and neglecting to furnish a band cutter for the use of the longshoremen, or, in the alternative, in failing to dispatch a ship's carpenter into the hold to break the steel straps containing said dunnage.

The defendant in its motion to dismiss makes the following contentions:

(1) That there was no obligation on the part of the shipowner to furnish the tools in question.

(2) That even if they were negligent in not so doing, that proximate cause is lacking; in other words, that the death of the longshoreman in this particular case was not reasonably foreseeable by the shipowner; that the acts of the longshoremen of themselves broke whatever chain of causation there might have been between the alleged negligence of the shipowner and the death of decedent.

The difficulty with defendant's argument is that while it might be persuasive on a motion to dismiss made at the close of plaintiff's case at trial, it cannot be made on a motion to dismiss on the pleadings. At this stage of the proceedings all of the elements of plaintiff's complaint must be deemed admitted, including the allegation mentioned above (Par. VI of the complaint) reading as follows:

“The death of said William J. Aldridge was directly and proximately caused by the afore-said carelessness and negligence of defendants.”

At the close of plaintiff's case the trial court may feel that plaintiff has failed to establish (1) that by custom and practice in Pacific Coast ports it was the obligation of the shipowner, and not the stevedores, to furnish proper tools, or in the alternative, a ship's carpenter, to break down these bales of dunnage; or (2) that even though there was such an obligation, the death of plaintiff's decedent could not have been reasonably foreseen by the shipowner as a possible result of a breach of said obligation.

In *Cook v. Maier*, 33 C.A. 2d 581, at page 583, the Court stated:

“It is the rule that the natural and probable consequences of a negligent act or omission are those which should reasonably have been anticipated, but it is sufficient to plead negligence generally, and whether or not the negligence pleaded and the results therefrom are true are questions of fact which cannot be determined upon demurrer.”

Under law, therefore, it is sufficient as a matter of pleading to allege a causal connection between the alleged negligence and the injury. Whether such is the fact or not cannot be raised by way of demurrer or motion to dismiss, but must be determined at time of trial.

It is respectfully submitted, therefore, that plaintiff's motion to dismiss should be denied.

Dated: May 31, 1957.

Respectfully submitted,

GLADSTEIN, ANDERSON,
LEONARD & SIBBETT,

By /s/ EWING SIBBETT,
Attorneys for Plaintiff.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

DEFENDANT'S CLOSING MEMORANDUM

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss suggests no new theory upon which relief can be granted but urges that defendant's remedy is by a motion for non-suit rather than a motion to dismiss.

In the U. S. District Court's practice under the Federal Rules of Civil Procedure where, as here, it appears from the allegations of the complaint that the asserted negligence was not the proximate cause of the alleged injury the proper remedy is a Motion to Dismiss under FRCP 12(b)(6):

Shelaeff v. Groves

(USDC ND Cal. SD, Judge St. Sure 1939)
27 F. Supp. 1018 @ 1020.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,
/s/ ROBERT E. PATMONT,
Attorneys for Defendant.

Dated: June 3, 1957.

Certificate of service by mail attached.

[Endorsed]: Filed June 7, 1957.

In the United States District Court for the North-
ern District of California, Southern Division

No. 36315

ARMIDA ALDRIDGE,

Plaintiff,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation; et al.,

Defendants.

ORDER

Defendant States Marine Corporation has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Assuming arguendo that the shipowner had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the

breach of this duty was not the proximate cause of decedent's death.

Accordingly, defendant's motion is granted and the complaint is dismissed.

It Is So Ordered.

Dated: July 2nd, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 2, 1957.

[Title of District Court and Cause.]

MOTION TO RECONSIDER AND VACATE
AND SET ASIDE ORDER OF DISMISSAL
AND TO PERMIT THE FILING OF A
SECOND AMENDED COMPLAINT

To the Defendants Above Named, and to Messrs.
Graham, James & Rolph, Their Attorneys:

You and Each of You Will Please Take Notice that on Tuesday, July 23, 1957, at the hour of 9:00 a.m. of said day, plaintiff will move the Honorable Edward P. Murphy, in his Court Room, Post Office Building, 7th and Mission Streets, San Francisco, California, for an order setting aside his order of dismissal of plaintiff's complaint heretofore made, and to permit plaintiff to file a second amended complaint herein.

Said motion will be made upon all of the papers and records in this action, and upon the grounds that there are facts present in this case which if alleged would state a cause of action against defendants and that in the interests of justice plaintiff should be permitted to amend her first amended complaint to set forth said facts.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,
Attorneys for Plaintiff.

Memorandum of Points and Authorities: F. R. C. P. Rule 15(a); *Ferguson v. Moore-McCormack Lines*, 1 L. Ed. 2d 512.

Receipt of copy acknowledged.

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

ORDER

In the above-entitled matter plaintiff has moved this court for an order setting aside its order of dismissal of plaintiff's complaint, and to permit plaintiff to file a second amended complaint.

This motion was argued orally and submitted.

I can find no valid reason for vacating the order dismissing the complaint heretofore made on July 2, 1957.

Accordingly, plaintiff's motion is hereby denied and it is so ordered.

Dated: July 25th, 1957.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 25, 1957.

[Title of Court of Appeals and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

You Are Hereby Notified that the plaintiff herein does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain order of dismissal entered herein on July 2, 1957, and from that certain order entered herein on July 25, 1957, denying plaintiff's motion to vacate and set aside said order dated July 2, 1957.

Dated: July 29, 1957.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,
Attorneys for Plaintiff.

[Endorsed]: Filed July 30, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court, City and County of San Francisco, with copy of Complaint.

Bond on Removal.

Notice by Defendant of Motion to Dismiss With Supporting Memo.

First Amended Complaint.

Memorandum of Plaintiff in Opposition to Motion to Dismiss.

Closing Memorandum of Defendant.

Order Granting Motion of Defendant to Dismiss.

Motion of Plaintiff to Reconsider and Vacate Order of Dismissal.

Order Denying Motion to Reconsider.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

Appellee's Designation of Record on Appeal.

Reporter's Transcript of Excerpts From Record on Appeal, April 29, May 27 and July 25, 1957.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of August, 1957.

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes the supplemental record on appeal herein as designated by counsel for the appellee:

Notice and Motion by Defendant to dismiss, with supporting memo.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 4th day of September, 1957.

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

EXCERPTS ON APPEAL

Monday, April 29, 1957

The Clerk: Aldridge versus States Marine Corporation.

Mr. Patmont: Ready for the defendant, your Honor.

Plaintiff's counsel advises me that he is going to file an amended complaint. Could we have that motion taken off calendar pending——

The Court: The current motion?

Mr. Patmont: The current motion. I may want to renew it when there is an amended complaint.

The Court: That is the Aldridge case?

Mr. Patmont: The Aldridge case.

The Court: Off calendar.

Monday, May 27, 1957

Before Hon: Edward P. Murphy.

The Clerk: Aldridge versus States Marine Corporation, Motion to Dismiss Plaintiff's First Amended Complaint.

Mr. Patmont: If your Honor please, this is an action brought by the widow of a longshoreman to recover damages for his death. The action was originally filed in the superior court and was removed here, and the defendant, States Marine Corporation, filed a motion to dismiss the original complaint, which motion was ordered off calendar when we learned that the plaintiff was to file a first amended complaint. We have a memorandum in support of the original motion to dismiss, which does in some respects relate to our motion now, which is to dismiss the first amended complaint. We have also filed a supplemental memorandum in support of this motion, which largely takes care of our argument; but I point out that there is another memorandum, if your Honor is reading through the file. We would appreciate it if both of them would be read.

Basically, the first amended complaint is one for negligence against the shipowner, and it seeks to recover damages for the death of a longshoreman which occurred when he and fellow members of his longshore gang were lifting up loads of dunnage by means of a cargo hook on the end of a winch, with a hook wrapped in the metal straps of the dunnage and raised up; and that in order to break these metal straps——

The Court: I know. And then he was hit by a piece of lumber falling out of the dunnage.

Mr. Sibbett: That's right, that's exactly what happened; or he was hit by the entire load of dunnage.

The Court: Now your point is that the owner of the vessel has no duty to furnish longshoremen with means to do their loading and unloading, is that right?

Mr. Patmont: That's right, your Honor.

The Court: And you also contend that even if there were such duty, failure to furnish tools for breaking this particular strapping which you have referred to was not the proximate cause of the accident?

Mr. Patmont: That's correct, your Honor.

The Court: And your third ground is that this longshoreman's death as it occurred was not within the foreseeable risk of the failure to furnish tools for breaking this type of——

Mr. Patmont: That is exactly our argument, your Honor.

The Court: Now, unless, Mr. Sibbett, you are in a position to come forward with some doctrine of liability which is not based upon negligence, I would be inclined to grant this motion. That is just my preliminary thinking.

Mr. Sibbett: Yes, your Honor; and I haven't had a chance to reply to the memorandum that has been on file, and I would like an opportunity to do that. However, the position I take in this matter is that the argument which is being made here might very properly be made at the end of the plaintiff's case, but we will show, or at least attempt to show, that by custom and practice in Pacific Coast ports and on the Pacific Coast, the longshoremen are not carpenters; they are not hired when they are han-

dling dunnage, it is not their job to take straps off. They use the dunnage in loading the ship and placing the cargo in its proper place.

The Court: Are you contending in any way that there is a cause of action here for unseaworthiness?

Mr. Sibbett: No, your Honor, because that has already been decided by your Honor and a number of other courts, that in a death action, we have the anomalous situation where a longshoreman's widow is not entitled to benefits of the doctrine of unseaworthiness.

The Court: Well, in any event, do you want time to reply to this memorandum?

Mr. Sibbett: I do, yes.

The Court: How much time?

Mr. Sibbett: Could we submit it next Monday with a memorandum? I will file it in the meantime.

The Court: Satisfactory?

Mr. Patmont: That will be satisfactory, your Honor. Possibly I would like one or two days to reply.

The Court: If you think it necessary.

Mr. Patmont: If I think it is necessary.

The Court: All right. You already have my preliminary thinking in the matter.

Mr. Sibbett: Yes.

The Court: You may have not more than two days.

Mr. Patmont: All right; thank you, your Honor.

The Court: Next Monday.

MOTION TO VACATE

July 25, 1957

The Clerk: Aldridge vs. States Marine Corporation, Motion to Reconsider, Vacate and Set Aside Order of Dismissal.

Mr. Gladstein: Ready, your Honor.

May it please the Court, this is an application for reconsideration of an Order made by this Court earlier this month, and a request that such Order be set aside, that it be held that the amended complaint does state a cause of action and that the defendant be required to answer.

The Order which your Honor entered in July says, in effect, that assuming the shipowner had a duty to the stevedores to furnish means with which to break certain strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of the decedent's death.

I am going to argue, your Honor, that probably because of our failure to direct the Court's attention to a recent decision of the Supreme Court of the United States, which I think is dispositive, this order was improvident. The amended complaint alleges, your Honor, that Aldridge, who was killed in this action, his wife brings this action for damages for wrongful death, went to work at 7:00 o'clock p.m. on the ship, and that he was killed about 1:00 o'clock in the morning, having worked some five or six hours; indeed, we say that he was

killed at approximately 1:55 a.m., so he had been there for almost seven hours.

During the course of the evening in performing the work, the longshoremen required dunnage, which, as your Honor knows, is sticks or pieces of lumber of varying sizes and length which are used to assist in stowage to create flooring and to act as wedging for cargo.

We allege on page 2 that in the early portion of the evening, when the dunnage was lowered into the hold, it was discovered that there were no snippers or cutters or shears that might be used to cut or sever the bands of steel which were around the piles of dunnage. I could describe those by analogy as something like a group of pickets, or a picket fence with a band of steel around each end.

We allege that ordinarily such means are provided by the ship or by the stevedoring company, and that when it was discovered early in the evening that there was no such means, requests were made by the longshoremen in this particular hold, including the decedent in this case, for assistance.

We allege that when this request was communicated to the defendant ship-owning company, including, as we say, its port captain who was there, and a carpenter, a ship's carpenter, an employee of the shipping company, that they did at various times come down into the hold equipped with hammers for the purpose of breaking these bands, and they did this from time to time.

The Court: Were they of the claw hammer type or variety?

Mr. Gladstein: I would assume so, although I do not know exactly what the hammer was. But it would be the kind of hammer that would enable, the use of which would enable a carpenter to break this band of steel which is—it's like a strap, usually about——

The Court: I know; I am familiar with it, but that would require the claw type of hammer in order to wedge it under there and break the strap-ping.

Mr. Gladstein: I would think so.

The Court: That's an important thing, the character of the hammer.

Mr. Gladstein: Well, we do allege here that the company itself, the shipping company, did send a carpenter down and that he did, in the early portion of the evening, with hammers, with equipment, break the bands. You see, we said: "But did send a carpenter into the hold equipped with hammers for the purpose of breaking said bands, and such was the means and methods provided by the defendants to free said dunnage during the early portion of the work."

Thereafter we say it became necessary from time to time to break the bands of other and additional loads of dunnage, similar requests by the longshoremen were made through their foreman, their supervisor and their walking boss, but by that time the defendants did negligently and carelessly fail to respond, did negligently and carelessly fail to provide or supply either persons or proper means by which the said bands could be cut or broken, and

by reason thereof the only means or methods remaining to the longshoremen by which these bands could be broken was to employ the hook of the winch. And this is a method which the proof at the trial would show is used, although it has inherent risks, but it is used and it is known by the shipping companies to be used when no means are supplied.

And what happens is that the hook of the winch falls is hooked into one of the bands and then the winch driver raises the falls and thereby raises the dunnage, and by means of jiggling and bouncing the dunnage up and down against the floor, breaks the band forcibly; the risk, of course, being that the dunnage falls apart suddenly and there is danger of somebody being hurt.

But the proof would show that this defendant knows and knew and by the exercise of reasonable care should have known and could have known that when longshoremen are not supplied with either a carpenter with a claw hammer or some kind of hammer, or with shears or scissors of some kind, snippers, that would cut these bands, there is no other method to which they can resort except that one.

Now, there is a notion prevalent that whenever a condition of that kind occurs, longshoremen ought to leave the work and walk off the ship. That notion is a fallacious one; it happens very, very seldom, and the records recently announced by the Pacific Maritime Association as to the fact that last year's loading operations in this city were the highest in the history of this city indicate that the men stay

on the job and do the best they can with what they have.

So we allege that after these calls in this hold by the decedent and his fellow workmen went unheeded, the port captain didn't come, the carpenter wasn't there, the claw hammers or other hammers weren't left there for them, there were no shears, they did resort, we say, to the only thing that was left to them, by raising the dunnage into the air and causing the weight thereof to break the straps. In the process of this being done, the dunnage fell in such a manner that one or more of the boards fell upon Mr. Aldridge and instantly inflicted upon him fatal injuries.

Now, your Honor's order was based on the theory, as I see it, that there was a lack of proximate cause because, if I understand the reasoning, it couldn't be said that the shipping company could reasonably foresee that if the shipping company failed to supply proper hammers or proper equipment, proper shears—well, that the men would resort to this. But I think that is a fact question to be decided on the evidence, and I believe, your Honor, that a strong analogy is to be found in the recent decision of the Supreme Court in *Ferguson against Moore-McCormack Lines*. I have the advance sheet. It is one Lawyer's Addition No. 7, and it is to be found at page 512.

This was a decision written by Mr. Justice Douglas, which was joined in the opinion by the Chief Justice, Mr. Justice Clark, Mr. Justice Brennan, Mr. Justice Burton concurred in the result; Mr.

Justice Reed and Mr. Justice Frankfurter and Harlan dissented and Mr. Justice Black took no part in the decision, so it was, in effect, a five-to-three decision. Now, here is what happened in that case. It involved a seaman, but as your Honor well knows, and no citation of authority is necessary on this, when a longshoreman goes aboard a ship and performs work which is traditionally that of seamen in the old, old days, he is to be treated as and equated as a seaman.

In this case the man was hurt in 1950 while serving as a second baker on the respondent's passenger ship Brazil.

“Among his duties, he was required to fill orders of the ship's waiters for ice cream. On the day of the accident, he had received an order from a ship's waiter for 12 portions of ice cream. When he got half way down in the 2½-gallon ice cream container from which he was filling these orders, the ice cream was so hard that it could not be removed with the * * *” scoop with which he had been provided.

“Petitioner undertook to remove the ice cream with a sharp butcher knife kept nearby, grasping the handle and chipping at the hard ice cream. The knife struck a spot in the ice cream which was so hard that his hand slipped down onto the blade of the knife, * * *” and he lost two fingers.

Now, at the trial it was held, that is, at the trial it was contended by the defendant, the shipping

company, that it could not be held legally responsible for having at all foreseen the possibility that this man, even if he didn't have the right implement, would actually take such a thing as a butcher knife and use it with its obvious dangers. The trial court permitted the case to go to the jury and the jury found from the evidence a verdict in favor of the plaintiff for \$17,500.00, which verdict was appealed to the Court of Appeals.

The Court of Appeals, with Judge Medina writing the decision, reversed, holding, and I quote from the opinion:

“It was not within the realm of reasonable foreseeability that petitioner would use the knife to chip the frozen ice cream.”

In other words, that there was no proximate cause between the negligence of the ship in failing to supply a proper scoop and this man's injury.

The Supreme Court said: “We conclude that there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task.”

And in part of it they say: “Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases * * * could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident.

The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fairminded men could conclude that respondent should have foreseen that petitioner might be tempted to use the knife to perform his task with dispatch, since no adequate implement was furnished him."

"Since the standard of liability under the Jones Act is that established by Congress under the Federal Employers' Liability Act * * * what we said in *Rogers against Missouri Pacific*, is relevant here:

" 'Under this statute the test of a jury case is simply whether the proofs justify with reason (an inference) that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' "

Now, the Supreme Court reinstated the judgment in favor—the judgment and verdict in favor of the plaintiff. Now, your Honor, we have that case here with this difference. I think our case is stronger. The proofs would show here, different from the case from which I have just read, that many times in the history of longshore operations this company and other companies know that longshoremen do resort—they feel compelled to resort—to this same method, risky though it is, of breaking the dunnage in order to enable them to get on with the work, and that, therefore, there is even stronger basis for holding that the jury could say they could have foreseen.

Your Honor decided this in such a way that un-

less the order is vacated by August 2, any right of ours to appeal would be lost. But I would like to ask your Honor to do what your Honor did recently in a case quite different, I know, in which your Honor said that if it becomes the view of a judge of this court that the ruling he has made is in error, the judge ought to have the courage to say so and not require a party litigant to go to the Court of Appeals. I submit, your Honor, that this Order of the Court was improvident, should be vacated, and the defendant should be required to answer our complaint.

Mr. Patmont: Your Honor please, the motion addressed to the Court and by the plaintiffs in this action recites that there are facts present in this case which, if alleged, would state a cause of action against the defendants and that in the interests of justice plaintiff should be permitted to file what would in effect be her third complaint.

We have heard no suggestion, nor is there any suggestion in the motion as to what the additional facts would be permitting an amendment of the complaint, or which would state a cause of action in a second amended complaint, and we believe, therefore, that the purpose of this motion has been simply to attempt to get an extension, if possible, or a tolling of the time within which plaintiffs would have to appeal.

The steps heretofore taken by the plaintiff in this case have been free, calculated and deliberate. They have had an opportunity to brief and draft two complaints, argue before this Court as to any

theory they may have had on the proximate cause question, the Court has considered a memorandum filed by us on both—two memoranda, one on the original complaint and one on the first amended complaint, having to do with the question of causation and foreseeability.

We do not believe that the motion is well taken insofar as it purports to say that there are facts which, if alleged, would state a cause of action, because we haven't heard any facts, nor have we had any indication of what a third complaint in this case would look like.

Now, with respect to the Ferguson case which has been urged this morning as dispositive of this case, we submit that that case makes no change in any applicable law, nor does it affect nor should it affect the ruling of the Court heretofore made in granting the motion to dismiss.

That case, which was under the Jones Act (this case is, first, not under the Jones Act), had as a key to it, we submit, a finding by the Court that the seaman there who was using the knife as an ice pick was ordered under penalty, I suppose, of discharge by his employer, who was ordered by the employer who had control over the work, the work he did and the manner in which he did it, to serve and serve fast seven or twelve scoopings of ice cream, the Court saying in that case that there was evidence that petitioner had been instructed to give the waiters prompt service, that the ice cream was terrifically hard. We think that the fact that the plaintiff in that case was required by the shipowner,

as its employee, to fill the orders for ice cream under instructions to give prompt service, created a relationship between him and his employer which does not exist between the shipowner and the plaintiff decedent in this case.

Here we don't have a situation of a man doing work where the shipowner has any control over the manner in which he does his work, or cannot control, has no supervision over him or can't tell him how or how not to do his work.

In this connection we would cite to your Honor a decision of the Second Circuit, *Berti vs. Compagnie de Navigation Cyprien Fabre*, 213 Fed. 2d 397, the Court there holding, in 1954, that the shipowner has no duty that requires stevedores to stop doing work in an unsafe manner, has no duty to supervise it, has no control; the stevedore is employed by an independent contractor and the manner in which the stevedore performs his work and the supervision of that work is between the stevedore, the longshoreman and his boss, the shipowner having no control.

We think, therefore, that the Ferguson opinion which rests, as it does, on a finding of the Supreme Court, of the control over the seamen by the shipowner, the fact that they told him to do the work and told him to do it fast makes that case a little bit different than what we have here.

The Court: They did not tell him to use the butcher knife specifically, did they?

Mr. Patmont: No; but they didn't give him any other tool; they gave him the ice cream hard and

they told him to serve it up fast. This was his boss talking to him, in effect, saying here's the job, do it fast, do it with what you've got, and we submit are responsible for the manner in which he did that work much more so than the shipowner can be responsible in the case of a stevedore who is employed by an independent contractor.

In this connection, your Honor, we would point out that the first complaint filed by the plaintiffs in this case did allege that the shipowner had a duty to supervise and oversee the work of this longshoreman and prevent him from killing himself. We filed a motion to dismiss directed to that argument, in part, and in the original memorandum we have in support of our motion to dismiss there are cases cited which clearly negate any argument the shipowner has a duty to supervise and oversee. The shipowner, once again we point out, has no control over the manner in which the longshoreman does his work, and if the longshoreman is killed as the result of the manner in which he performs his work, that is not the shipowner's responsibility.

Any other construction of the Ferguson case would simply mean that any question of causation is a jury question and we submit here that that is obviously ridiculous. There are questions of causation that are obviously beyond a jury's province.

The question of causation, as has been decided also by the Second Circuit in an opinion after the Ferguson case—I will give you that citation—Gwinett vs. Albatross, another Second Circuit case, 243 Fed. 2d 8. This case is after the Ferguson case

and states the question of liability in negligence cases still depends upon the foreseeability of harm, that the Ferguson case has not changed that rule, that the only thing is that in the Ferguson facts the question of control over the manner in which the plaintiff did his work was much more closely connected to the shipowner than it is in this case.

The controlling fact in this case, your Honor, and it has been brought out in cases already cited and discussed in the memoranda filed heretofore, is the fact that the plaintiff decedent in this action himself did a reckless thing in standing under a load of dunnage which, as alleged in the complaint, weighs between one and two tons, which he knew and, indeed, expected would fall.

In that case it is the clearest instance you can have of an independent foolhardy act breaking a chain of causation. Under no construction can it be said that it is within the realm of reasonable foreseeability, the rule that applies in all of these cases, that a man standing under one or two tons of lumber that he expects will fall and lifts up for the purpose of having it fall, can't complain of anything other than his own foolish act.

We submit, your Honor, once again that all of the questions in this case have been discussed. The plaintiff has had two bites of the apple, now he wants a third. It is obvious that there is no amendment of the complaint, as the plaintiff alleges, or states in its motion that can be made, without trifling with the facts. We would point out the

language of Judge Goodman in the Battat case, 56 Fed. Sup. 967 at page 969 where he says:

“Inasmuch as it is clear that the libelant cannot state a cause of action in either count”—there were two counts in that case—“without trifling with the facts, the exceptions to both counts should be and are sustained without leave to amend.”

Similarly in *Grace against Ford Motor Company*, the Ninth Circuit, 278 Fed. 955, the Court said:

“The difficulty which confronts the appellant is not a defect in its pleading, but the nature of the facts which have been disclosed.”

We say here that the only problem facing the plaintiff in this case is that in its two complaints, and there have been two complaints heretofore filed, one of which was voluntarily amended, the other of which was dismissed, both of which were subject to motion to dismiss made by us, that it is obvious from the extent and completeness of the facts alleged what caused the injury and how the question of proximate cause had to be applied.

We say simply, then, that the ruling heretofore made was correct, there is really nothing new, the Ferguson case doesn't change anything, and that your Honor's ruling should stand.

The Court: May the matter be submitted?

Mr. Gladstein: Yes, your Honor, it may be submitted.

[Endorsed]: Filed August 16, 1957.

[Endorsed]: No. 15698. United States Court of Appeals for the Ninth Circuit. Armida Aldridge, Appellant, vs. States Marine Corporation of Delaware, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 29, 1957.

Docketed September 6, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15698

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
HER APPEAL

Comes now appellant and hereby, pursuant to Rule 17(6), states the points upon which she intends to rely on her appeal, namely:

1. The Order of the District Court Judge of July 2, 1957, dismissing the within action, and his Order of July 25, 1957, denying plaintiff's motion to reconsider and vacate and set aside order of dismissal and to permit the filing of a second amended complaint, are contrary to law.

2. The said Orders unconstitutionally deprive appellant of her right to a jury trial.

Dated: September 4, 1957.

GLADSTEIN, ANDERSEN,
LEONARD & SIBBETT,

By /s/ E. SIBBETT,

Attorneys for Appellant.

[Endorsed]: Filed September 6, 1957.

No. 15,698

United States Court of Appeals
For the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

VS.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
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Attorneys for Appellant.

FILED

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PAUL P. GIBBEN, CLERK

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No. 15,698

**United States Court of Appeals
For the Ninth Circuit**

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELA-
WARE, a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from orders of the District Court for the Northern District of California (R. 33, 35) dismissing plaintiff's (appellant's) first amended complaint without leave to amend.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court below is based upon the diversity of citizenship of the parties (28 USCA 1332). This Court has jurisdiction to review the judgment below by virtue of the provisions of §§1291 and 1294(1), 28 USCA.

OPINIONS BELOW.

Although there was no formal opinion of the Court below, District Judge Edward P. Murphy's Order (R. 33-34), dismissing the first amended complaint, sets forth the reason therefor as follows:

"Assuming *arguendo* that the shipowners had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of decedent's death.

"Accordingly, defendant's motion is granted and the complaint is dismissed."

STATEMENT OF THE CASE.

Appellant is the widow of a longshoreman who was killed on October 25, 1956, at Pier 44, San Francisco, California, while engaged in work as a longshoreman aboard the American vessel SS LONE STAR STATE, owned and operated by States Marine Corporation of Delaware, appellee herein.

Appellant brought suit for damages in the San Francisco Superior Court against States Marine Corporation, her complaint charging in two counts: (1) that her husband's death was caused by the unseaworthiness of the vessel, its gear and appurtenances; and (2) that his death was caused by the negligence of appellee, its agent and employees. The case was removed by appellee to the Federal District Court below, on the grounds of diversity of citizenship of

the parties. Appellant thereupon filed timely demand for jury trial.¹

Appellee then moved to dismiss the complaint on two grounds: (1) that due to the absence of a maritime death statute, the doctrine of unseaworthiness, upon which the first cause of action in the complaint is based, cannot be invoked by appellant in this case; and (2) that the second count should be dismissed because lack of proximate cause appeared from the face of the complaint itself. Appellant thereupon filed an amended complaint eliminating the first count based on unseaworthiness, and containing one count based on negligence only.

The charging allegations of the first amended complaint are set forth in paragraphs IV, V and VI thereof (R. 18-21), and in substance are as follows:

IV.

That on October 25, 1956, at Pier 44, San Francisco, California, decedent Aldridge was working aboard the SS LONE STAR STATE as a longshoreman employed by Schirmer Stevedoring Co. That in performing said work he occupied the position of a seaman in that he was doing work which traditionally was performed by members of the crew. That by reason of this fact appellee owed the decedent a duty to furnish adequate tools for the performance of his work and a reasonably safe place in which to work.

¹See entry No. 4, "Excerpt from Docket Entries", certified Transcript of Record before this Court.

V.

That decedent reported for duty aboard the SS LONE STAR STATE at 7 a.m. on the morning of October 25, 1956, and proceeded with other longshoremen to work in the number three hold of the vessel. That during the course of the work it was necessary for the longshoremen to use dunnage in the stowage of cargo. That for that purpose bundles of dunnage, each bundle weighing between one and two tons, and consisting of large pieces of lumber of various sizes and weights strapped together by metal bands, were lowered into the hold of the vessel. That when the first load of dunnage came into the hold, the longshoremen requested of appellee's Port Captain and other of appellee's employees that they be supplied with band cutters or other mechanical means for breaking the steel bands around the dunnage. That the longshoremen were advised that no band cutters or other mechanical means were available for this purpose on the ship but sent a ship's carpenter into the hold equipped with hammers for the purpose of breaking the bands. That such was the means provided by the vessel to free the dunnage during the early portion of the work. That later on in the day, when it was necessary to break the steel bands surrounding an additional bale of dunnage coming into the hold, the supervisory personnel of appellee, although requested to do so, negligently and carelessly failed to provide or supply either the ship's carpenter or band cutters or other mechanical means by which the bands could be cut or broken. That by reason of

such carelessness and negligence, the only means and method remaining to the longshoremen for breaking the dunnage free of the steel bands was to employ the hook secured to the winch fall. That this was accomplished by inserting the same into the steel bands and then raising the load of dunnage and breaking the steel bands by means of the weight of the dunnage itself. That in performing the operation in this manner, several heavy timbers fell upon decedent, inflicting fatal injuries upon him.

VI.

The death of said William J. Aldridge was directly and proximately caused by the aforesaid carelessness and negligence of defendants.

Appellee then moved to dismiss the first amended complaint upon the ground that, *as a matter of law*, it appeared from the allegations thereof that the alleged negligence of the appellee was not a proximate cause of the longshoremen's death. District Judge Edward P. Murphy sustained the motion on this ground (R 33).

Appellant then moved to vacate and set this order aside, or in the alternative for permission to file an amended complaint (R 34-35). The motion was denied, and this appeal follows.

SPECIFICATION OF ERRORS.

1. Appellant's first amended complaint sets forth a cause of action against appellee and the order of the Honorable District Judge below dismissing the same is contrary to law and unconstitutionally deprives appellant of her right to a jury trial on the issue of negligence and proximate causation.

2. The subsequent order of the Honorable District Judge below (R. 35), denying appellant an opportunity to amend her first amended complaint to remedy the defects felt by the District Judge to reside in her first amended complaint, was also erroneous.

ARGUMENT.**I.****GENERAL PRINCIPLES OF LAW APPLICABLE
TO THE CASE AT BAR.**

A. On a motion to dismiss, the pleadings must be viewed in a light most favorable to plaintiff. *Machado v. McGrath*, 193 F. 2d 706 (C.A.D.C.); *Louisiana Farmers Protective Union v. Great A & P Tea Co.*, 131 F. 2d 419 (8 Cir.).

"This court frequently has commented upon the considerations which should govern in ruling upon a motion to dismiss a complaint for insufficiency of statement. It is unnecessary to repeat here what the court has said on many occasions, particularly in the case of *Leimer v. State Mutual Life Assurance Co.*, 8 Cir., 108 F. 2d 302, in which reference is made to many of the pertinent decisions of this court. It is enough to

observe, as was done in the Leimer case, that no matter how improbable it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless, entitled to the opportunity to make the attempt. The opinion of the district judge, in advance of a hearing, as to the impossibility of proof of a cause of action fairly stated, is not decisive of the rights of the parties. And see *Sparks v. England*, 8 Cir., 113 F. 2d 579, 581."

Louisiana Farmers Protective Union v. Great A & P Tea Co., *supra*, at 423-424.

B. Plaintiff's right to a jury trial in negligence cases is being guarded by the Supreme Court with ever increasing zealousness.

Tennant v. Peoria & Pekin R. Co., (1943), 321 U.S. 29. This was an action for wrongful death under the Federal Employers Liability Act. The Court of Appeals for the Seventh Circuit reversed a jury verdict in the court below for \$26,250.00. The Supreme Court reversed the Court of Appeals, having this to say at page 35:

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * "

Schulz v. Pennsylvania R. Co. (1955), 350 U.S. 523. This was an action for wrongful death brought under the Jones Act. The District Court directed a verdict

for the defendant, and the Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed, holding that the case should have gone to the jury. The Court stated at page 525:

“In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. ‘[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.’ *Jones v. East Tennessee, V. & G. R. Co.*, 128 US 443, 445, 32 L ed 478, 480, 9 S Ct 118 (1888).”

Ferguson v. Moore-McCormack Lines, Inc., (1957) 1 L. ed. 2d 511. This was also a suit for damages under the Jones Act. The Court of Appeals for the Second Circuit reversed a jury verdict in favor of plaintiff, holding that it was “not within the realm of reasonable foreseeability” that petitioner would

use a knife to chip frozen ice cream. The Supreme Court reversed, stating at pages 513-514:

“Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a preeminent role in these Jones Act cases (*Jacob v. New York*, 315 US 752, 86 L ed 1166, 62 S Ct 854; *Schulz v. Pennsylvania R. Co.*, 350 US 523, 100 L ed 668, 76 S Ct 608), could conclude that petitioner had been furnished no safe tool to perform the task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him. * * *

* * * * *

“Because the jury could have so concluded, the Court of Appeals erred in holding that respondent’s motion for a directed verdict should have been granted. ‘Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.’ *Wilkerson v. McCarthy*, 336 US 53, 62, 93 L ed 497, 505, 69 S Ct 413.”

Rogers v. Missouri Pacific R. Co. (1957), 1 L.ed. 2d 493, 515. This was an action for damages under the Federal Employers Liability Act. The trial Court directed a verdict in favor of the plaintiff. The Su-

preme Court of Missouri reversed on the ground that the employee's evidence did not support the finding of the employer's liability. On certiorari, the Supreme Court reversed the decision of the Court below, having this to say at pages 499-501:

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. * * * (Emphasis added.)

* * * * *

"Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination. * * * "

Webb v. Illinois Central R. Co. (1957), 1 L.ed. 2d 503. This was an action against a railroad for damages for personal injuries. The trial judge refused to direct a verdict for the defendant railroad. The Court of Appeals for the Seventh Circuit reversed. The Supreme Court reversed the latter Court, stating at pages 506-507:

"Although we do not think that the case presents an issue of causation, if the quoted language of the Court of Appeals is read as holding that a

jury finding could not reasonably be made that respondent's negligence 'in whole or in part' caused the petitioner's injury, then what we said in *Rogers v Missouri Pacific R. Co.*US,, 1 L ed 2d 493, 515, 77 S Ct, also decided today, is pertinent:

“ ‘ . . . But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases . . . ’

“ ‘Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented, is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made

out whether or not the evidence allows the jury a choice of other probabilities.’ ”

C. In the absence of state cases to the contrary,² the federal Courts will apply the principles and definitions of proximate causation set forth in the *Restatement of Torts* in passing upon the question of whether or not the issue of causation in a particular case is a jury question. *United States v. Marshall*, 230 F. 2d 183 (9 Cir.).

D. The pertinent principles and definitions of the *Restatement of Torts* (*United States v. Marshall*, *supra*, pp. 190, 191) are as follows:

“Section 441 of the *Restatement of Torts* defines an Intervening Force. ‘(1) An intervening force is one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed.

“(2) Whether the active operation of an intervening force prevents the actor’s antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in Section 442 to 453.’ We later consider such of these sections as are applicable.

“The comment on Subsection (2) of Section 441, states p. 1187:

“‘d. The active operation of an intervening force may or may not be a superseding cause which relieves the actor from liability for another’s harm occurring thereafter;’ and ‘ * * * both the actor and the third person are concurrently liable * * * although the actor’s con-

²We have found no California cases to the contrary.

duct has ceased to operate actively and has merely created a condition which is made harmful by the operation of the intervening force set in motion by the third person's negligent or otherwise wrongful conduct. However, while there is concurrent liability, the two forces are not concurrent causes as that term is customarily used. To be a concurrent cause, the effects of the negligent conduct of both the actor and the third person must be in active and substantially simultaneous operation. (See Sec. 439).'

* * * * *

"Section 447 of the Restatement of Torts reads:

" 'Negligence of Intervening Acts.

" 'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

" '(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

" '(b) a reasonable man knowing the situation existing when the act of a third person was done would not regard it as highly extraordinary that the third person had so acted.

" '(c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.' "

E. The question of proximate causation in a negligence action is ordinarily a question of fact and not

of law. *United States v. Marshall*, *supra*, at 192. This is also the rule in California. *Gerberich v. Southern California Edison Co., Ltd.*, 5 Cal. 2d 46; *Copfer v. Golden*, 135 C.A. 2d 623; *O'Hey v. Matson Navigation Co.*, 135 C.A. 2d 819; *Darnold v. Voges*, 143 C.A. 2d 230.

II.

APPLICATION OF THE FOREGOING GENERAL RULES TO THE CASE AT BAR.

The first amended complaint in this action alleges: (1) that the appellee negligently failed to furnish certain tools to assist the decedent and his fellow longshoremen in performing their work in a safe manner; and (2) that such negligence was the proximate cause of the accident which ensued.

While from the face of the complaint it appears that there was a subsequent intervening act which "triggered" the accident, the question of whether such an act was a *superseding* or *concurrent cause* (See provisions of *Restatement of Torts, supra*) is for the trier of the facts to decide. It is not for the Court to decide on a motion to dismiss. This is so even though the intervening cause was itself a negligent act (See Section 447, *Restatement of Torts*, quoted in full *supra*).

To hold otherwise would unconstitutionally deprive appellant of her right to a jury trial on this crucial issue.

III.

ASSUMING ARGUENDO THAT THE FIRST AMENDED COMPLAINT ON ITS FACE SHOWS A LACK OF PROXIMATE CAUSE, IT WAS ERROR FOR THE COURT BELOW TO REFUSE APPELLANT THE OPPORTUNITY TO AMEND, ALLEGING FACTS SHOWING SUCH PROXIMATE CAUSE.

In the argument on appellant's motion to vacate and set aside the order of the Court below dismissing her first amended complaint, her counsel stated (R. 44, 46) that the appellant would introduce evidence at the time of trial (1) that ordinarily the shipowner furnishes proper tools for the particular operation here involved; (2) that when such tools are not made available to the longshoremen, the only method left to them to accomplish their objective is to do what was done in this case; and (3) that the shipowner knew, or by the exercise of reasonable care should have known, that this was the fact.

There could be no question but that a complaint containing such allegations would state a cause of action against appellee, although it would, of course, be incumbent upon appellant to produce competent evidence at the time of trial to support the allegations.

CONCLUSION.

It is respectfully submitted that the Court below erred in granting appellee's motion to dismiss appellant's first amended complaint without leave to amend.

Dated, San Francisco, California,
January 6, 1958.

Respectfully submitted,
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No. 15,698

United States Court of Appeals
For the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE,
a Corporation,

Appellee.

APPELLEE'S BRIEF.

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No. 15,698

United States Court of Appeals For the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

VS.

STATES MARINE CORPORATION OF DELAWARE,
a Corporation,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

The District Court's jurisdiction in this action was based upon the amount in controversy and diversity of citizenship of the parties as disclosed by the verified petition for removal (R. 3-5) from the Superior Court of San Francisco. 28 U.S.C. 1332. This Court's jurisdiction on appeal is based on 28 U.S.C. 1291, 1294 (1).

APPELLEE'S STATEMENT OF THE CASE.

This is an appeal from District Judge Edward P. Murphy's order (R. 33-34) dismissing appellant's first amended complaint for failure to state a claim upon which relief can be granted, and from his order (R. 35-36)

denying appellant's motion to set aside the order of dismissal and permit the filing of a second amended complaint.

Appellant brought her action below to recover damages for the death of a longshoreman who was killed when a load of heavy wooden dunnage fell upon him. Appellant does not allege that the accident was caused by any defect in the gear or equipment of appellee's vessel or by any negligence in the operation of such gear by the vessel's crew. There is no dispute as to the manner in which the decedent was killed. He and other members of his longshore gang, all employees of the Schirmer Stevedoring Company, an independent contractor, undertook while on board the appellee's vessel to break the metal bands around a load of dunnage by placing a cargo hook in the bands and raising the load into the air. The dunnage weighed between one and two tons, and it was expected that the bands would break under the weight of the load, causing the dunnage to fall on the deck where appellant's decedent was standing.

Appellant concedes the immediate cause of the accident but contends that appellee was negligent in failing to prevent it by providing band cutters or other means for the longshoremen to break the bands. Appellant has filed two separate complaints (R. 6-12; R. 17-22) which describe in great detail the circumstances connected with the accident. The facts are thus before this Court and the only issue concerns the inferences to be drawn from them.

SUMMARY OF ARGUMENT.

The motion to dismiss appellant's first amended complaint was properly granted. Although the averments of the pleading must be viewed in a light most favorable to the appellant, they clearly disclose the impossibility of stating and proving a claim upon which relief can be granted.

The first amended complaint is fatally defective because it clearly shows that appellant's decedent was negligent as a matter of law. This action, unknown to the general maritime law, is brought under the California death statute. It is governed not by the comparative negligence doctrine of the maritime law, but by the contributory negligence rule of California which operates to bar appellant's recovery even assuming actionable negligence on the part of the shipowner.

The first amended complaint is also defective because it affirmatively appears from the facts alleged that the decedent's death was not proximately caused by any negligent act or omission of the appellee shipowner. The duty, if it existed, to provide means with which to break the metal strapping was contractual in nature and its breach cannot afford the basis for this tort action. Appellant seeks to impose upon the shipowner a duty to oversee, supervise and control the manner in which the employees of an independent stevedoring contractor perform their work. The law neither recognizes nor exacts any such duty.

Appellant relies upon several Federal Employers' Liability Act and Jones Act cases which were heard by the

United States Supreme Court in its 1956 Term. These were statutory negligence actions involving special features drafted in the master-servant context. Appellant's reliance upon these cases is wholly unfounded in the third party situation present here. The appellee had no control over the manner in which the longshoremen performed their work and is not responsible for the dangerous method chosen by them to break the dunnage bands.

The court below did not abuse its discretion in dismissing appellant's first amended complaint without leave to amend. The difficulty which confronts the appellant is not her failure to allege enough facts, but is instead the nature of these facts as disclosed by the detailed allegations of both complaints. Appellant has not submitted a copy of the proposed new amendment, nor has she suggested to the court below or to this Court any new facts which would support her claim. Appellant seeks to enlarge the theory presented by her pleading, but in so doing she still cannot overcome its basic defects.

ARGUMENT.

I.

THE ASSERTED CONDUCT OF APPELLANT'S DECEDENT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW, AND BARS HER FROM RECOVERY IN THIS ACTION.

In the absence of statute, no recovery for wrongful death is recognized as a part of the general maritime law.

Western Fuel Co. v. Garcia (1921) 257 U.S. 233;
The Harrisburg (1886) 119 U.S. 199.

There is no maritime death statute available to support this action. Appellant's claim is instead brought under the provisions of Section 377 of the California Code of Civil Procedure, which permits the heirs or personal representatives of a decedent to maintain an action for damages for death caused by the "wrongful act or neglect" of another.

In *Western Fuel Co. v. Garcia*, supra, the Supreme Court held that the one-year statute of limitations applicable in this state must govern in an admiralty action brought under the California death act. The admiralty rule of laches was held not to apply because the limitation provision was an integral part of the statutory right of action there sought to be enforced. This same reasoning has established by the overwhelming weight of authority the practice of determining the effect of contributory negligence by the law of the state under whose death statute the claim is brought.

Curtis v. A. Garcia Y Cia. (3 Cir. 1957) 241 F. 2d 30;

Graham v. A. Lusi, Limited (5 Cir. 1953) 206 F. 2d 223;

Klingseisen v. Costanzo Transp. Co. (3 Cir. 1939) 101 F. 2d 902;

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Robinson v. Detroit & C. Steam Nav. Co. (6 Cir. 1896) 73 Fed. 883;

Hartford Accident & Indemnity Co. v. Gulf Refining Co. (E. D. La. 1954) 127 F. Supp. 469;

The A. W. Thompson (S. D. N.Y. 1889) 39 Fed. 115;

See *The H. S., Inc., No. 72* (3 Cir. 1942) 130 F. 2d 341, 343;

Quinette v. Bisso (5 Cir. 1905) 136 Fed. 825, 838;

The City of Norwalk (S. D. N. Y. 1893) 55 Fed. 98, 112.

We recognize that the Court of Appeals for the First Circuit has indicated an intention to depart from the established rule. See *O'Leary v. United States Line Company* (1 Cir. 1954) 215 F. 2d 708, 711.¹ Even there, however, the court did not reach a contrary holding.

“In this case, however, we do not, and indeed we cannot except by dictum, pass upon the question of the law applicable to count one. The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonably be made under either local or maritime law. Wherefore we do not reach the question of contributory negligence wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages.” (215 F. 2d 708, 712).

The basis of the well settled and correct rule is that the cause of action for wrongful death, unknown to the general maritime law, must be enforced as it exists within

¹The contrary discussion in the *O'Leary* case is a logical extension of the solitary position taken by that Court on the matter of a federal court's jurisdiction to entertain maritime actions on its law side in the absence of diversity of citizenship. Compare *Doucette v. Vincent* (1 Cir. 1952) 194 F. 2d 834, with *Jordine v. Walling* (3 Cir. 1950) 185 F. 2d 662; *Paduano v. Yamashita Kisen Kabushiki Kaisha* (2 Cir. 1955) 221 F. 2d 615; *Modin v. Matson Nav. Co.* (9 Cir. 1942) 128 F. 2d 194.

the state creating it.² This principle was well expressed in *Graham v. A. Lusi, Limited* (5 Cir. 1953) 206 F. 2d 223, 225:

“We are in no doubt that appellant’s right of action under [the Florida Wrongful Death Statute], like other rights of action arising in admiralty under Lord Campbell’s act and similar acts, is to be enforced according to the principles of the common law, and contributory negligence and the exercise of due care are absolute defenses thereunder. Without this statute, the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representatives of a deceased maritime employee to recover indemnity for his death. Cf. *Lindgren v. United States*, 281 U.S. 38, 47, 50 S. Ct. 207, 211, 74 L. Ed. 686. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the appellee under the jurisdiction of the state, if successfully maintained, will bar recovery under the libel.”

This rule has likewise been recognized by implication within this Circuit, where it has been held that the California death statute does not create a cause of action for unseaworthiness.

Mortenson v. Pacific Far East Line (N.D. Cal. 1956) 148 F. Supp. 71.

It is settled law in California that the contributory negligence of a decedent bars any recovery by his heirs

² “[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.” Mr. Justice Black in *Garrett v. Moore-McCormack Co.* (1942) 317 U.S. 239, 245.

under this statute. Such negligence provides a complete defense and does not serve only to mitigate damages.

Buckley v. Chadwick (1955) 45 Cal. 2d 183, 288 P. 2d 12;

See *Carroll v. Beavers* (1954) 126 Cal. App. 2d 828, 273 P. 2d 56, 59;

Chinnis v. Pomona Pump Co. (1940) 36 Cal. App. 2d 633, 98 P. 2d 560, 565.

It is also recognized in California that contributory negligence can exist as a matter of law.

Powers v. Raymond (1925) 197 Cal. 126, 239 Pac. 1069.

That appellant's decedent was guilty of such negligence is apparent from the facts alleged in the amended complaint. He was 52 years old and had been employed as a longshoreman for approximately 30 years (R. 21). It is also clear from the amended complaint that the decedent voluntarily participated in the method selected by the longshoremen for breaking the straps (R. 19-20). He therefore was or should have been aware of the dangers inherent in standing beneath a load of dunnage weighing between one and two tons, raised by means of straps which he and the other longshoremen knew—actually intended—would break.³ The death of appellant's decedent was caused by a foolish and reckless act which he chose to do in plain disregard of his own safety. The conclusion

³Appellant's decedent was thus like a willing Damocles, the flatterer whom Dionysius of Syracuse rebuked for his constant praises of the happiness of kings by seating him at a royal banquet beneath a sword hung by a single hair.

that he was negligent is thus inescapable under the facts alleged.

Regardless of the validity of any claim appellant might otherwise be able to state against the appellee, she is barred from recovery in this action because her decedent was negligent as a matter of law.

See *Grenawalt v. South African Marine Corporation* (S.D. N.Y. 1955) 130 F. Supp. 432, 434.

Although this ground of defense was not specifically argued in the court below, it was clearly encompassed by appellee's motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted (R. 22-23). The order dismissing the amended complaint is supportable on this ground and accordingly should be affirmed.

II.

IT IS APPARENT ON THE AMENDED COMPLAINT THAT APPELLEE'S FAILURE TO FURNISH MEANS FOR BREAKING THE DUNNAGE STRAPS WAS NOT THE PROXIMATE CAUSE OF THE DECEDENT'S DEATH.

In the court below appellee based its defense in part upon the argument that the shipowner, as a matter of law, had no duty to provide band cutters or some other means to break the metal bands strapped around the load of dunnage (R. 23-24). Considerable support for this proposition is found in those cases imposing no liability upon a vessel or her owners for the failure to provide implements which by their very nature are not part of the ship's equipment, tackle and machinery, but are instead peculiar

to the loading and unloading work of which the stevedores are in control. See, for example:

Signore v. S.S. Ferngulf (S.D.N.Y. 1952) 103 F. Supp. 677;

Riley, Admx. v. Agwilines (1947) 296 N.Y. 402, 1947 A.M.C. 1038.

It is equally true that a vessel's voluntary offer of some of her facilities cannot be converted into a duty to furnish this type of equipment in lieu of the stevedore's obligation to do so.

See *O'Connell v. Naess* (2 Cir. 1949) 176 F. 2d 138, 140.

We do not concede that this argument has no application on an appeal from an order granting a motion to dismiss. This is particularly true where the pleading shows that the decedent was employed by an independent stevedoring contractor and that the method employed for breaking the straps was part of the business and within the control of the stevedore. For the purposes of this appeal, however, and in light of the wording⁴ of Judge Murphy's order granting the motion, this argument will not be formally presented.

⁴"Assuming arguendo that the shipowner had a duty to the stevedores to furnish means with which to break the strapping, it affirmatively appears from the facts alleged in the complaint that the breach of this duty was not the proximate cause of decedent's death." (R. 33-34)

A. The Recent Pronouncements by the Supreme Court in Federal Employers' Liability Act and Jones Act Cases Are Not Applicable to the Case at Bar.

Counsel for the appellant place great reliance upon a series of cases heard in the October, 1956 Term of the United States Supreme Court wherein the elements of *employer* negligence were considered under the principles of the Federal Employers' Liability Act.⁵

Rogers v. Missouri P.R. Co. (1957) 352 U.S. 500, 524, 529;

Webb v. Illinois C.R. Co. (1957) 352 U.S. 512, 521;

Herdman v. Pennsylvania R. Co. (1957) 352 U.S. 518, 521;

Ferguson v. Moore-McCormack Lines (1957) 352 U.S. 521, 524;

Arnold v. Panhandle & S.F.R. Co. (1957) 353 U.S. 360;

Ringhiser v. Chesapeake & O.R. Co. (1957) 354 U.S. 901.

With the exception of *Ferguson v. Moore-McCormack Lines*, *supra*, a Jones Act⁶ case involving the same statutory provisions, each was an F.E.L.A. suit brought by a railroad employee. The gist of the Supreme Court's rulings is found in the language of Mr. Justice Brennan's opinion in the *Rogers* case (352 U.S. 500, 505):

“Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

⁵35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

⁶37 Stat. 1185 (1915), as amended, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

slightest, in producing the injury or death for which damages are sought.”

Mr. Justice Brennan further points out that the Court is concerned only with “the special features of this statutory negligence action” which involve a “far more drastic duty” of the master to his servant than that existing in the ordinary common-law negligence action. The “significantly different” aspects of these F.E.L.A. and Jones Act cases clearly negate their application in any situation not precisely governed by the same statutory provisions.

But there is a more compelling reason for distinguishing the result of these cases. Even in applying the “in whole or in part”⁷ doctrine of employer negligence in the F.E.L.A. setting the Supreme Court did not depart from the fundamental concept that a basis for a finding of liability must exist before a jury case is presented. Indeed, such was the actual holding in *Herdman v. Pennsylvania R. Co.* (1957) 352 U.S. 518, 521, where the court affirmed a judgment entered on a directed verdict in favor of the employer.

The remaining decisions must then be viewed with reference to the nature of the accident and the degree to which it relates to the employer’s supervision and control as presupposed by the statute. The holding in *Ferguson v. Moore-McCormack Lines* (1957) 352 U.S. 521, 524, that a jury question was presented on the issue of

⁷“ . . . [E]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury . . . or . . . death . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .” 45 U.S.C. § 51.

the employer's negligence in failing to provide the plaintiff with a proper tool for chipping hard ice cream is thus readily explainable. The plaintiff was under instructions from his employer to give prompt service in filling ice cream orders. His employer was in direct control of the manner in which this was to be done. Commensurate with the employee's duty to obey was the employer's obligation to furnish him safe tools for his job. Given this relationship, it was then clearly a question of fact whether it was foreseeable that Ferguson would use the butcher knife at hand in obeying his employer's order to give prompt service.

At best these cases are restricted in their application only to those situations governed expressly by the standards embodied in the Federal Employers' Liability Act. Even in this limited area, however, there has already been some obvious confusion as to the meaning of the Supreme Court's recent rulings. This is aptly illustrated by two cases arising in the Court of Appeals for the Seventh Circuit. In *Gibson v. Elgin, Joliet & Eastern Railway Company* (7 Cir. 1957) 246 F. 2d 834, the court held that although a finding essential to support a verdict in favor of the plaintiff in an F.E.L.A. case was "based upon one inference which rests in turn upon another inference," it was constrained under the decision in *Rogers v. Missouri P.R. Co.* (1957) 352 U.S. 500, 524, 559, to permit speculation, conjecture and possibilities to support a jury verdict. Three months later, however, the same court in *Milom v. New York Central Railroad Company* (7 Cir. 1957) 248 F. 2d 52 took the opposite view and reversed a judgment entered on a jury verdict for

the plaintiff in another F.E.L.A. case on the ground that it could *not* speculate as to the cause of the injury. The misgivings felt as a result of the Supreme Court's rulings are expressed in Chief Judge Duffy's concurring opinion (248 F. 2d 52, 57):

"In view of these recent decisions, I have great difficulty in visualizing a situation where an inference could not be made from some kind of circumstantial evidence, which would be said to support a verdict for the plaintiff. If I were completely convinced, it would be my duty to dissent in the case at bar, *Gibson v. E.J. & E. Ry. Co.*, 7 Cir., 246 F. 2d 834 opinion on rehearing. However, I shall await with great interest further pronouncements by the Supreme Court."

Whatever might be the true meaning of these decisions we can only wait with Judge Duffy to learn. It is clear, however, that they do not apply in this case.

B. Appellee Had No Duty to Supervise the Work of Appellant's Decedent or Control the Manner in Which It Was Performed.

The original complaint in this action contained an allegation that the appellee owed a duty to oversee and supervise the work of the deceased longshoreman (R. 7). Although this express allegation was deleted from the amended complaint, its spirit still lingers. Appellant must necessarily found her claim upon some affirmative duty of supervision, even though she has impliedly conceded that no such duty exists. The action is not based upon any allegations of "operating" negligence or defects in the vessel's condition chargeable to the shipowner. Appellant instead seeks to impose upon the appellee a duty to prevent the longshoremen from selecting and con-

tinuing to use an unsafe method of work. The cases do not go this far. They clearly relieve the shipowner from any obligation to exercise with respect to independent harbor workers the kind of supervisory responsibility or "nursing care" necessary to prevent them from disregarding the plain measures to be taken for their own safety.

Manera v. United States (E.D.N.Y. 1954) 124 F. Supp. 226;

Berti v. Compagnie De Navigation Cyprien Fabre (2 Cir. 1954) 213 F. 2d 397;

See *Grenawalt v. South African Marine Corporation* (S.D.N.Y. 1955) 130 F. Supp. 432, 434;

Lynch v. United States (2 Cir. 1947) 163 F. 2d 97, 98.

In *O'Leary v. United States Line Company* (1 Cir. 1954) 215 F. 2d 708, the court had occasion in an action for the death of a longshoreman brought under the Massachusetts version of Lord Campbell's Act to consider the question of the shipowner's duty under facts analogous to those here presented.

"No claim is made that the vessel involved was unseaworthy in any respect. Both counts sound in negligence generally, that is, without specification of any precise fault, so we must look to see whether there is any evidence from which a jury might reasonably find that the defendant shipowner was negligent in the performance of any duty of care it owed to the decedent as an employee of an independent contractor.

"* * *[A]ny finding of the defendant's negligence must be predicated on a duty to light. * * * Lighting

the hold was an incident of the stevedoring operation over which the shipowner retained no control, and if there was any breach of the duty to light, the breach was that of the master stevedore, not that of the shipowner. * * * Under these circumstances the plaintiff must be content with her remedies under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950, without what Mr. Justice Jackson dissenting in *Pope & Talbot, Inc. v. Hawk*, supra, 346 U.S. at page 419, 74 S. Ct. at page 210 referred to as 'a bonus recovery over and above the statutory scale of compensation that Congress has established for injured harbor workers in general.' '' (215 F. 2d 708, 712, 713).

C. If Appellee Had a Duty to Provide Means With Which to Break the Dunnage Straps, That Duty Was Contractual in Nature and Its Breach Would Not Give Rise to a Tort Action.

In the absence of a duty actually to supervise and control the manner in which the longshoremen performed their work or to prevent them from performing it in an unsafe manner, the shipowner's failure to provide band cutters can give rise to no claim in this action. This is so even though appellee may have had a "duty" to provide them. There is no relation existing between the parties which calls for any stronger duty than that which may be said to exist by contract. This is not a master-servant situation; the shipowner and the employees of an independent stevedoring contractor are strangers to any relation other than that of business invitor and invitee. The requirements of that relationship were fully satisfied by appellee. There is no question in this case as to the condition of the vessel or her equipment, or that there were dangers involved which were known to

the owner and not to the "guest."⁸ And there is really no issue as to whether there was, as appellant contends, an agreement by the shipowner to provide in effect a tool for the use of the longshoremen or whether this was the responsibility of the stevedore. Even if the appellee had this duty and failed to fulfill it no tort cause of action has been stated.

Moch v. Rensselaer Water Co. (1928) 247 N.Y. 160, 159 N.E. 896.

Mr. Justice Cardozo's opinion in the *Moch* case is one of his landmarks. It was written for a unanimous court when he was Chief Judge of the New York Court of Appeals. On a motion to dismiss in the nature of a demurrer, the court denied recovery against a water-works company which, after notice of the existence of a fire, failed to supply to the street main the pressure which it had contracted with the city to supply. The plaintiff's building had been destroyed. The court found no basis for a tort action even though it were assumed that the defendant had been *negligent* in failing to maintain the water pressure. Cardozo's language still stands as a classic of judicial eloquence (159 N.E. 896, 898, 899):

"The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and nonfeasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective

⁸Cf. *Puleo v. H. E. Moss & Co.* (2 Cir. 1947) 159 F. 2d 842, 845, cert. denied, 331 U.S. 847.

of a contract, a tort may result as well from the acts of omission as of commission in the fulfillment of the duty thus recognized by law. * * * What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. * * * The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm or has stopped where inaction is at most a refusal to become an instrument for good. * * *

“The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with everyone who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort. * * * We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. * * * The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together. Again we may say in the words of the Supreme Court of the United States ‘The law does not spread its protection so far.’ * * * What we are dealing with at this time is a mere negligent omission unaccompanied by malice or any aggravating elements. The failure in such circumstances to fur-

nish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong.”

The principle applied in the “waterworks” case is clearly supported by the weight of authority in this country. See Prosser on Torts (1941 Ed.) p. 208; Seavey, Mr. Justice Cardozo and the Law of Torts (1939) 52 Harv. L. Rev. 372, 391. It has been applied to deny tort liability in numerous other factual situations analogous to the one here presented, all of which have involved the defendant’s failure to perform as agreed. See, for example:

- Randolph’s Adm’r. v. Snyder* (1910) 139 Ky. 159, 129 S.W. 562 (failure to attend as a physician);
Newton v. Brook (1902) 134 Ala. 269, 32 So. 722 (failure to prepare property for shipment by certain train);
Stone v. Johnson (1938) 89 N.H. 329, 197 Atl. 713, aff’d. (1939) 90 N.H. 311, 8 A. 2d 743 (failure to furnish light for nurse’s room);
Dawson Cotton Oil Co. v. Kenan, McKay & Speir (1918) 21 Ga. App. 688, 94 S.E. 1037 (failure to deliver goods ordered).

We submit that these cases are controlling here.

D. Appellee’s Defenses Affirmatively Appear From the Facts Alleged in the Amended Complaint and Can Properly Be Raised by Motion to Dismiss.

It is apparent from the amended complaint that the decedent’s death was caused solely by an improper and careless use of the ship’s gear by the longshoremen in

the performance of their work. This Court has repeatedly held that the shipowner is not liable for such misuse of a vessel's equipment.

Freitas v. Pacific-Atlantic Steamship Company (9 Cir. 1955) 218 F. 2d 562;

Vileski v. Pacific-Atlantic S.S. Co. (9 Cir. 1947) 163 F. 2d 553;

The Daisy (9 Cir. 1922) 282 Fed. 261.

It is also obvious from the amended complaint that plaintiff's decedent voluntarily participated in this unsafe work method and that he did so in reckless disregard of his own safety. For this there can be no recovery.

Jackson v. Pittsburgh S.S. Co. (6 Cir. 1942) 131 F. 2d 668.

The *Jackson* case is a compelling authority in support of the ruling below. There the court affirmed an order dismissing a complaint for failure to state a claim against the defendant shipowner in either of two causes of action. The complaint alleged that the plaintiff was injured when he jumped about six feet from the deck of a vessel to the dock. The plaintiff alleged that there was no ladder or other means of egress from the ship, that he requested a member of the crew to place a ladder over the side so that he might go ashore, and that this request was refused. In a per curiam opinion the court said (131 F. 2d 668, 669, 670):

“Assuming that the failure of the ship to provide a ladder at the time and place indicated was a breach of duty on the part of the owners and therefore, negligence, we are unable to perceive that such negligence bore any causal relation to the injuries of the

plaintiff which followed. The court was right in dismissing the first cause of action.” [for negligence]

* * *

“The plaintiff was not compelled to jump from the ship. The only expectable injury that he might have suffered from the failure to provide a ladder would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured in the service of the ship. The court was likewise right in dismissing the second cause of action.” [for maintenance and cure]

Appellant’s suggestion that it is not for the court to decide a question of proximate causation on a motion to dismiss is plainly incorrect. Where it appears from the allegations of the complaint that the asserted negligence was not the proximate cause of the alleged injury, the proper remedy is a motion to dismiss.

Shelaeff v. Groves (N.D. Cal. 1939) 27 F. Supp. 1018;

Accord, *Hawley v. Alaska S.S. Co.* (9 Cir. 1956) 236 F. 2d 307.

The motion which was granted by the court below challenged the appellant’s right to relief on the basis of the facts as stated in the amended complaint. In this connection, the language of Judge St. Sure in *Shelaeff v. Groves*, *supra*, is pertinent:

“The alleged facts are susceptible of but one inference, and that is that the acts of the defendants or either of them were not the proximate cause of the death of [plaintiff’s decedent]. I doubt if it will be possible for plaintiff to amend so as to state a claim against either [of the defendants], and I am of the opinion that the motion should be granted without leave to amend.” (27 F. Supp. 1018, 1020)

III.

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANT’S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND.

Appellant now contends that it was error for the court below to refuse her permission to file a third complaint. But in the court below counsel for the appellant was content to rely on the allegations set forth in the first amended complaint, and offered no additional facts for the proposed new amendment (R. 43, 51). The only suggestion now advanced by appellant is that certain allegations could be added tending to show the basis of an agreement by the shipowner to supply band cutters. At best this is an attempt to enlarge upon a theory of recovery which is defective in its inception. This case does not turn on that issue. There is thus no ground for the proposed amendment.

Gutensohn v. Kansas City Southern Ry. Co. (8 Cir. 1944) 140 F. 2d 950.

Appellant has filed two separate complaints which set forth in great detail the uncontroverted facts of the accident. Her counsel had the opportunity to prepare and

submit to the court below a copy of the proposed new amendment, but this was not done.⁹ The difficulty with appellant's position is that all of the pertinent facts are before this Court, and the inferences to be drawn from them are clear.

"The appellant argues that * * * the libel should be sustained, * * * and that the appellant should be permitted to amend its pleading; but there is no suggestion that other evidence on the merits of the case may be adduced in addition to what is contained in the record. The difficulty which confronts the appellant is not a defect in its pleading, but the nature of the facts which have been disclosed." *W. R. Grace & Co. v. Ford Motor Co. of Canada* (9 Cir. 1922) 278 Fed. 955, 959.

Again in *Suckow Borax Mines Consol. v. Borax Consolidated* (9 Cir. 1950) 185 F. 2d 196, cert. denied (1951) 340 U.S. 943, this Court said on an appeal from an order granting a motion to dismiss a second amended complaint:

"Appellants did not submit a copy of a proposed third amendment nor suggest to the trial court or to this court the nature or text of the amendment which they desired to make. Nor did they indicate in what respect this amendment would or could overcome appellee's defenses. * * * Under the circumstances of this case we can not find abuse of discretion in the trial court's denial of the motion." (185 F. 2d 196, 209)

⁹"Common sense dictates the necessity of having before the Court the proposed amendment." *Schwab v. Nathan* (S.D.N.Y. 1948) 8 F.R.D. 227, 228.

It is too late in the day for appellant's proposed amendment. The facts are all before the court and they speak for themselves. It is therefore appropriate to conclude with the observations of Judge Goodman in *Battat v. Home Ins. Co. of New York* (N.D. Cal. 1944) 56 F. Supp. 967, 969:

“Inasmuch as it is clear that libelant cannot state a cause of action in either count without trifling with the facts, the exceptions to both counts should be sustained without leave to amend.”

CONCLUSION.

For the reasons stated, the order of the court below dismissing the first amended complaint without leave to amend should be affirmed.

Dated, San Francisco, California,
February 6, 1958.

Respectfully submitted,

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No. 15,698

United States Court of Appeals
For the Ninth Circuit

ARMIDA ALDRIDGE,

Appellant,

VS.

STATES MARINE CORPORATION OF DELAWARE,
a Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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No. 15,698

United States Court of Appeals For the Ninth Circuit

ARMIDA ALDRIDGE,

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STATES MARINE CORPORATION OF DELAWARE,
a Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Walter L. Pope, Chief Judge, and William Healy and Frederick G. Hamley, Circuit Judges:

Appellee States Marine Corporation of Delaware hereby petitions for a rehearing upon the Judgment of Reversal rendered herein on March 16, 1959.

GROUND'S FOR THE PETITION.

I

THE RIGHTS OF THE PARTIES IN THIS CASE SHOULD HAVE BEEN DETERMINED UNDER CALIFORNIA LAW.

This Court has now held that the sufficiency of the complaint must be judged in the light of maritime law and that the law of California does not govern the effect of the decedent's contributory negligence. As we read

the cases decided by the United States Supreme Court on February 24, 1959, this holding was wrong.

In *M/V Tungus v. Skovgaard* (1959) 359 U.S., 3 L. Ed. 2d 524, the Supreme Court reviewed a case arising under the New Jersey Wrongful Death Act for the purpose of considering "the relationship of maritime and local law in cases of this kind." The respondent was there urging that in all such cases the maritime law should govern the substantive rights of the parties in order to insure uniformity of result. In rejecting this argument the Court pointed out that there is no "maritime law" in death cases; it held that where an action is brought under a state wrongful death statute the rights of the parties depend *entirely* upon that statute. It said (3 L. Ed. 2d at 528, 529):

"The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. That is what was decided in *The Harrisburg*, where the Court's language was unmistakable: '. . . [I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' 119 U.S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years. See *The Hamilton*, 207 U.S. 398; *La Bourgogne*, 210 U.S. 95; *Western Fuel Co. v. Garcia*, 257 U.S. 233; *Levinson v. Deupree*, 345 U.S. 648; cf. *Just v. Chambers*, 312 U.S. 383.

“ ‘Admiralty courts when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state.’ Garrett v. Moore-McCormack Co., 317 U.S. 239, 245. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.

* * *

“There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern Pacific v. Jensen*, which fathered the ‘uniformity’ concept, recognized that uniformity is not offended by ‘the right given to recover in death cases.’ 244 U.S. 205 at 216. It would be an anomaly to hold that a state may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. cf. *Caldarola v. Eckert*, 332 U.S. 155.

“We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey.”

The principle that the needs of a uniform federal maritime law are not offended by the enforcement of rights and liabilities under state law in wrongful death actions was likewise recognized by the Supreme Court in *Romero v. International Term. Operat. Co.* (1959) 359 U.S.,

3 L. Ed. 2d 368. The Court there held that claims under the general maritime law are not comprehended within the federal statute according jurisdiction to the District Courts of suits arising under the Constitution or laws of the United States, and referred to the claim that all enforced rights pertaining to matters maritime are rooted in federal law as “a destructive over-simplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce.” (3 L. Ed. 2d at 382). The Court made express reference to the fact that “Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence.” (3 L. Ed. 2d at 384 n. 42).

Clearly the language of the Supreme Court in the *Tungus* and *Romero* cases establishes that actions under state wrongful death statutes do not stand upon the same footing as do other maritime tort actions. It is equally clear that the Supreme Court has included contributory negligence as a matter to be determined by the state law. In the *Tungus* case the Supreme Court was faced with an absence of any authoritative ruling from the courts of New Jersey and it thus did not disturb a doubtful prediction that the New Jersey statute encompassed a claim for unseaworthiness. The Court emphasized, however, that it was incumbent upon the federal courts to enforce any state wrongful death statute in accordance with the terms of that statute and the decisions rendered under it as a matter of state law.

Our argument that the effect of Aldridge’s contributory negligence must be governed by the law of California was

precisely what the Supreme Court has now ruled. We must necessarily take exception to this Court's application of the maritime rule of comparative negligence on the basis of *Pope & Talbot, Inc. v. Hawn* (1953) 346 U.S. 406, or *Kermarec v. Transatlantique* (1959) 359 U.S., 3 L. Ed. 2d 550, inasmuch as neither of these cases involved an action under a state wrongful death statute. It has now been settled by the Supreme Court that the results in these maritime personal injury actions have no bearing here.

We must also take exception to this Court's reliance upon *United N.Y. & N.J. S.H. Pilots Asso. v. Halecki* (1959) 359 U.S., 3 L. Ed. 2d 541. Although the Supreme Court's reversal in that case was not directed to the negligence aspects of a decision of the Court of Appeals (*Halecki v. United New York & New Jersey S.H.P. Ass'n.* (2 Cir. 1958) 251 F. 2d 708), the only negligence point mentioned by the Supreme Court concerned the matter of duties owing by a shipowner to a business guest; it did not deal with the question of contributory negligence. To the extent that this Court has adopted the reasoning of the Court of Appeals for the Second Circuit in engrafting onto a state wrongful death statute the maritime rule of comparative negligence "so as to avoid capricious and irrational distinctions" (251 F. 2d at 713), it has failed to make the necessary distinction between injury and death cases. It is now firmly established that this Court must apply the law of California to determine the effect of the decedent's contributory negligence notwithstanding such application will produce a different result than that in an injury case.

A broad interpretation of the California statute "as taking over as a part of the model it accepted the exemption of contributory negligence as a bar" was not in accordance with the decisions of this State. The California Supreme Court has spoken authoritatively on the subject and it is incumbent upon this Court to follow the California decisions. We respectfully submit that we are thus entitled to a correction of the Opinion of March 16, 1959, and that under a proper application of the California law the ruling of the court below was correct.

II

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION UNDER CALIFORNIA LAW, AND THIS COURT SHOULD HAVE SO HELD.

It is settled law in California that the contributory negligence of a decedent bars any recovery by his heirs or personal representatives under the California wrongful death statute. We urged this point in our Brief and we wish to avoid repetition. We do, however, feel it essential to place before this Court the authoritative pronouncements of the California courts which negate any interpretation of § 377 of the Code of Civil Procedure as incorporating the maritime rule of comparative negligence.

Buckley v. Chadwick (1955) 45 Cal. 2d 183, 288 P. 2d 12, is the leading California case. Prior to that decision the California cases had, since 1862 when California's original wrongful death statute was enacted in light of the English decisions under Lord Campbell's Act, "consistently and unswervingly followed the rule . . . that contributory negligence on the part of the decedent bars recovery in

wrongful death actions.” (288 P. 2d at 21). In the *Buckley* case the plaintiffs challenged the validity of these prior decisions on the ground that a Los Angeles Superior Court judge had recently suggested they were wrong. See Nourse, “*Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*” 42 Cal. L. Rev. 310 (1954). For this reason the California Supreme Court made an extensive analysis of the origin, development and acceptance of the rule recognizing contributory negligence of the decedent as a defense in wrongful death actions in this State.

The California Supreme Court pointed out that the defense of contributory negligence was firmly established when California first enacted the progenitor of § 377 of the Code of Civil Procedure. It then noted that although § 377 has been amended three times, contributory negligence was never abolished as a defense. It concluded (288 P. 2d at 22):

“Under the circumstances which have been related it must be recognized that until the Legislature sees fit to provide otherwise the rule is established in this State that in wrongful death actions contributory negligence on the part of the deceased is defensive matter and, when shown, will bar recovery.”

The *Buckley* case establishes conclusively that the defense of contributory negligence is an integral part of the California wrongful death statute. Both the Supreme Court and the Congress of the United States have expressed “deep concern” that the power of the States to create wrongful death actions with such defenses not be affected by federal law. See *M/V Tungus v. Skovgaard*,

supra, at 3 L. Ed. 2d 529. Indeed, there is no federal law in cases of this kind to which the State courts could look even if state law were not competent to determine the rights created by it. This "void" can be filled only by the state law which this Court is bound to apply in its entirety.

We have disagreed with this Court's statement that "The sufficiency of the complaint must be judged in the light of maritime law." We cannot overemphasize it: *The Supreme Court has placed wrongful death actions on an entirely different basis than other maritime tort actions, and has required the federal courts to choose and apply all of the state law in actions arising under state wrongful death statutes.* Part of the law of California which this Court must apply is the defense of contributory negligence. An equally important part of California law is the rule that contributory negligence can exist as a matter of law, and that a complaint which discloses that harm occurred as the result of an obvious danger fails to state a cause of action.

In *Powers v. Raymond* (1925) 197 Cal. 126, 239 Pac. 1069, the plaintiff was injured by falling on an unlighted pathway leading from the defendant's hotel to a railroad station. A well lighted roadway was available for the plaintiff's use, but she voluntarily chose to enter the dark pathway. The California Supreme Court ruled that even though there may have been negligence on the part of the defendant, the conclusion was impelled that the plaintiff was guilty of contributory negligence as a matter of law. In response to the plaintiff's assertion that it was the duty of the defendant to place some sign or obstruction

at the entrance of the dark path to warn those who might choose to enter, the court held that the darkness was in itself a sufficient warning not to use the path.

Cole v. Rush (1955) 45 C. 2d 345, 289 P. 2d 450, involved facts quite analogous to those alleged here. The widow and minor children of a saloon patron who was killed in a fight brought a wrongful death action against the saloon keepers. The material allegations of the complaint were that the defendants, with knowledge of the decedent's belligerent proclivities when intoxicated and notwithstanding numerous prior requests by the plaintiff widow not to do so, negligently furnished intoxicating liquor to the deceased; that because the defendants so allowed the decedent to become intoxicated he became belligerent and engaged in fisticuffs, thereby sustaining fatal injuries. The trial court sustained a demurrer without leave to amend, and the Supreme Court affirmed. It held that the complaint did not state facts sufficient to constitute a cause of action inasmuch as it showed on its face that the decedent's injuries were caused or contributed to by his own fault and negligence.

In *Shanley v. American Olive Co.* (1921) 185 Cal. 552, 197 Pac. 793, the plaintiff alleged that the defendant had constructed a building so close to its spur track that the side ladder of a freight car would clear it only by a few inches, and that plaintiff, a railway switchman, was crushed in an attempt to climb the ladder while the car was moving past the building. On the plaintiff's appeal from an order granting the defendant's motion for judgment on the pleadings the Supreme Court of California affirmed. The Court said (197 Pac. at 794):

“From the facts alleged it appears that the plaintiff, as a member of the crew switching the car, was invited by the defendant to enter its premises for the purpose of switching said car to the spur. . . . If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger.”

In *Hauser v. Pac. G. & E. Co.* (1933) 133 Cal. App. 222, 23 P. 2d 1068, the plaintiff appealed from an order granting the defendant's motion for judgment on the pleadings and denying the plaintiff's motion to file an amended complaint. The complaint showed that the plaintiff, with knowledge of the location of high tension wires, deliberately drove his derrick close enough to cause electricity to arc across the space. Although the complaint further alleged that the accident was caused solely by the negligence of the defendant in maintaining the power line, the Court said (23 P. 2d at 1070, 1071):

“From the complaint it appears that plaintiff knew of the dangerous character of the wires and their exact location and condition, and deliberately moved a derrick into them and was injured. From the foregoing, it appears the complaint and the amended complaint failed to set forth any cause of action.

* * *

“Although permission to amend pleadings is a matter within the sound discretion of the trial court,

courts should be liberal in the allowance of amendments, but as here, where a cause of action is not stated and it is apparent from the facts alleged a cause of action cannot by amendment be stated, there is no abuse in refusing to grant the amendment.”

Royal Ins. Co. v. Mazzei (1942) 50 Cal. App. 2d 549, 123 P. 2d 586 involved facts similar to those in the *Hauser* case. The court affirmed a judgment of dismissal entered in favor of a defendant after his demurrer was sustained without leave to amend. The court noted that the complaint affirmatively showed that the accident was caused by a danger that would have been obvious in the exercise of ordinary care, and that the defendant was not required to give to his invitee notice or warning of the obvious danger.

It is clear that the District Court’s order of dismissal in this case would have been affirmed under a proper application of the California law. The “consistent and unswerving” adherence by the California courts to the defense of contributory negligence in wrongful death actions, the settled rule that a complaint showing that harm resulted from obvious dangers fails to state a cause of action, and the presumption under California law against the pleader and in favor of the judgment of dismissal where, as here, the plaintiff has at no time suggested additional facts to support another amendment (see the *Hauser* and *Mazzei* cases, *supra*), all clearly set forth the state law which this Court is obliged to follow. The “risky procedures” which this Court recognized as affirmatively appearing on the complaint cannot be avoided by viewing the sufficiency of the complaint in the light of

maritime law. State law must be applied, and on this basis we now petition this Court to vacate its judgment of reversal and reinstate the order of the court below.

III

THIS CASE DOES NOT INVOLVE UNSEAWORTHINESS, AND THE SUGGESTIONS TO THE CONTRARY SHOULD BE STRICKEN FROM THE OPINION.

We respectfully petition for a rehearing on that portion of this Court's opinion which suggests that the appellant's complaint might be amended or altered at pretrial to include a cause of action for unseaworthiness. This matter was neither briefed by the parties nor argued before this Court; we request the opportunity to be heard for the first time on an issue which could materially affect the rights of the parties if this case is to be remanded for trial.

A divided court in *Skovgaard v. The M/V Tungus* (3 Cir. 1957) 252 F. 2d 14 construed the New Jersey Wrongful Death Act to include a cause of action for unseaworthiness. This interpretation of the New Jersey law was a "seriously doubtful" one which the Supreme Court itself characterized as "a prediction that might tomorrow be proved wrong by the courts of New Jersey." *M/V Tungus v. Skovgaard* (1959) 359 U.S. _____, 3 L. Ed. 2d 524, 530. Moreover, there are important differences in wording between the New Jersey and California statutes which in themselves preclude any reliance upon the *Skovgaard* interpretation for the California law. The New Jersey Act (N.J.S.A. 2A: 31-1) refers, among other things, to a

“default such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury.” The California statute is limited solely to deaths caused by “wrongful act or neglect.”

This Court has previously recognized that § 377 of the California Code of Civil Procedure does not encompass causes of action for the breach of what is essentially a contractual duty, and that a libel under the California wrongful death statute based upon a shipowner’s alleged failure to furnish maintenance and cure does not state a cause of action. *Willey v. Alaska Packers’ Ass’n.* (N.D. Cal. 1926) 9 F. 2d 937, affirmed (9 Cir. 1927) 18 F. 2d 8. It is manifest that the doctrine of unseaworthiness, a non-fault basis of liability which has developed under the theory of implied warranty existing by reason of the relationship between seaman and vessel, must be considered in the same light as the shipowner’s liability for maintenance and cure. Indeed, it has been squarely held that the California wrongful death statute does not support a cause of action for unseaworthiness. *Mortenson v. Pacific Far East Line* (N.D. Cal. 1956) 148 F. Supp. 71.

The California Supreme Court has made it clear that wrongful death actions in this State are to be governed by a construction of the California statute in light of the English decisions under Lord Campbell’s Act. *Buckley v. Chadwick* (1955) 45 Cal. 2d 183, 288 P. 2d 12; *Cole v. Rush* (1955) 45 C. 2d 234, 289 P. 2d 450, 456. Historically, neither the common law nor any of the decisions under Lord Campbell’s Act used the circumstance of unseaworthiness as a basis of imposing liability for non-negli-

gent personal injury. See *Skovgaard v. The M/V Tungus* (3 Cir. 1957) 252 F. 2d 14, 20 (dissenting opinion). Inasmuch as the California courts have clearly expressed an intention to view § 377 as adopting without change the settled construction of its English model, an interpretation of the California statute as borrowing what is to it the novel maritime concept of unseaworthiness is unwarranted.

Finally, we ask this Court to withdraw its comments pertaining to unseaworthiness on the ground that the facts alleged in neither the original nor the amended complaint would support such a cause of action even if it were permitted under state law. The suggestion of a cause of action for unseaworthiness in a case devoid of any allegations of defects in a vessel's gear, equipment or machinery—and indeed in a case where the only charging allegations pertain to the manner in which work has been performed—can only add hopeless confusion to an already misunderstood and misapplied doctrine. There is no basis for a cause of action for unseaworthiness under the facts here alleged; the Appellant withdrew that count voluntarily in the court below. We ask this Court to eliminate its references to the question of unseaworthiness and thereby withdraw the cloud which it has placed over the procedural steps heretofore taken in good faith to eliminate issues not involved.

IV

IT WAS ERROR FOR THIS COURT TO VIEW THE HALECKI CASE AS SUPPORTING A CAUSE OF ACTION FOR NEGLIGENCE UNDER THE FACTS ALLEGED IN THE COMPLAINT.

The Opinion in this case was based almost entirely upon the decision in *Halecki v. United New York & New Jersey S.H.P. Ass'n.* (3 Cir. 1958) 251 F. 2d 708, reversed (1959) 359 U.S. _____, 3 L. Ed. 2d 541. In support of its position this Court relies upon the fact that the Supreme Court's reversal of *Halecki* was not based upon the negligence questions there involved. Under the circumstances we are impelled to ask for a rehearing on the ground that the negligence aspects of the *Halecki* case have not been fully presented to this Court, nor were they so presented to the United States Supreme Court. (See brief for the Petitioner, pp. 56-60, *United N.Y. & N.J. S.H. Pilots Asso. v. Halecki* (1959) 359 U.S. _____, 3 L. Ed. 2d 541).

Except insofar as it may be distinguished along the lines suggested below, we strongly disagree with the *Halecki* case as decided by the Court of Appeals for the Second Circuit and we believe that the reasons for our disagreement are valid. That case involved harm to a person resulting from risks inherent in the work he was performing as an employee of an independent contractor. In supporting a cause of action for alleged negligence the Court of Appeals quoted a rule of law which in fact should not have applied to the situation there presented. As so misapplied an otherwise sensible rule of law has now been made to stand for the startling proposition that a shipowner can be liable for the dangerous work methods selected by employees of an independent contractor over whom he has no control.

The rule of law in question is set forth in the Restatement of Torts, Section 344. It requires the possessor of land to exercise reasonable care to minimize the risks created by an independent contractor working on his premises so that *other persons* lawfully entering thereon may not be harmed. As so stated and properly applied there is nothing new about the rule. But this rule was not intended nor should it apply to make the owner of premises liable for harm to the very person who creates the danger of which he complains. This is precisely what the Restatement of Torts itself provides in Section 340, which states that "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."

The ruling in the *Halecki* case can be justified only by viewing the decedent there as a *third person* lawfully entering the premises, and the dangerous condition, i.e. inadequate ventilation, as being something over which he had no control. To this extent the shipowner might properly have been held responsible either on the theory that it should have provided adequate ventilation itself or that it was responsible for seeing that the concessionaire in charge of this phase of work on its vessel did so. But if the *Halecki* case was intended to establish liability on the part of a shipowner in a situation where, as here, the danger is both known to and created by the person injured we cannot abide it. We likewise do not believe that this was the Supreme Court's intention.

We urge that the proper rule to be applied to the facts here alleged was announced in *Filipek v. Moore-McCormack Lines* (2 Cir. 1958) 258 F. 2d 734, cert. denied (1959) 3 L. Ed. 2d 629. The court there recognized that even under the liberal doctrines of the general maritime law a shipowner could not be held responsible to protect an employee of an independent contractor from the risks inherent in and created by the very work which he was performing on the vessel.

Whatever was said by either the Court of Appeals or the Supreme Court on the negligence question involved in *Halecki* cannot be viewed as anything greater than an expression of New Jersey state law. The Supreme Court made this much clear when in *M/V Tungus v. Skovgaard* (1959) 359 U.S., 3 L. Ed. 2d 524, it held that actions brought under a state wrongful death statute are to be governed entirely by state law. This case is to be governed neither by the laws of New Jersey nor the general maritime law. It is the California statute which this Court must apply, and for the reasons hereinabove stated the complaint did not state a cause of action cognizable under the laws of California.

CONCLUSION.

We believe that this Court failed to determine the rights of the parties in this case under state law as required by the United States Supreme Court. We also believe that the District Court's dismissal of the complaint was proper inasmuch as no cause of action was stated under Cali-

fornia law. Accordingly, we petition this Court as follows:

1. To vacate its Opinion and Judgment of Reversal dated March 16, 1959 and enter a judgment affirming the decision of the court below;

2. To withdraw from its Opinion of March 16, 1959 all references to "unseaworthiness" and to the general maritime law as controlling the substantive issues in this case; and

3. To grant a rehearing with oral argument upon the Opinion and Judgment of March 16, 1959 if the Court desires such argument for clarification of the issues presented herein.

Dated, San Francisco, California,

April 9, 1959.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,

ROBERT E. PATMONT,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL

I, Robert E. Patmont, hereby certify that I am counsel for the Appellee herein, that I prepared the foregoing petition for rehearing, that it is in my judgment well founded, and that it is not interposed for delay.

Dated, San Francisco, California,

April 9, 1959.

ROBERT E. PATMONT,

*Of Counsel for Appellee and
Petitioner.*

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM P. ROGERS, as Attorney General of the
United States of America,

Appellant,

v.

URHO PAAVO PATOKOSKI,

Appellee.

*Appeal from the United States District Court
for the District of Oregon.*

BRIEF FOR APPELLANT

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United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM P. ROGERS, as Attorney General of the
United States of America,

Appellant,

v.

URHO PAAVO PATOKOSKI,

Appellee.

*Appeal from the United States District Court
for the District of Oregon.*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the Attorney General from a declaratory judgment of United States citizenship. The suit was brought under Sec. 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503 (R. 3). The court below concluded that it had jurisdiction to award relief under that statute, and appellant does not dispute this conclusion.

STATEMENT OF THE CASE

Appellee was born in Finland on July 19, 1907 (R. 47, 29). His father was a Finn who previously had come to the United States and had lived here for a period of about eight years.¹ During that time the father became a naturalized citizen in Portland, Oregon, on August 13, 1894 (R. 60-61, 29, Exh. 1). However, the father went back to Finland in 1896 or 1897 and never returned to this country, continuing to live in Finland until his death in 1927 or 1928 (R. 47, 48; Dep. H. 5). After his return to Finland the father was married and appellee was born of that marriage at least 10 years after his father had left the United States (Id.).

Appellee continued to live in Finland until he was 40 years old. During this time he concededly knew that his father had become a naturalized citizen of the United States. His father had told him that he was an American citizen (R. 48); he remembered his "father stating that he was a citizen of the United States and could return to the United States at any time if necessary" (Dep. H. 5); he saw his father's naturalization paper for the first time "when my mother brought out that paper before she died" in 1945 (R. 54).²

¹ The eight year period was fixed by appellee at p. 5 in his testimony at the deportation hearing, part of the administrative file introduced as Exh. 6 in the court below and lodged with this Court by stipulation of the parties. Hereafter, references to the deportation hearing will be designated Dep. H.

² The court's Finding IX (R. 31) that the naturalization certificate was found among the mother's papers after her death is thus not an accurate reflection of the record.

However, appellee never was told that he himself was an American citizen, never made any inquiry of the American Consul (located 600 miles away) or anyone else, and always acted as a Finnish citizen, which he unquestionably was (R. 48, 54). He never professed American citizenship, since he considered himself a citizen of Finland (R. 55, 60, 64, 67; Dep. H. 5).

While in Finland appellee was married in 1936 to a Finnish girl and they had three children, all born in Finland (Dep. H. 6; Exh. 4). He was called for compulsory military service in the Finnish Army on three occasions: (1) March, 1928—May, 1929, entering as a private and advancing to sergeant; (2) October, 1939—July, 1940, entering as a sergeant and promoted to second lieutenant; (3) June, 1941—October, 1944, entering as a second lieutenant and emerging as a first lieutenant (R. 49-53, 30). He asserted, however, that he did not apply for officer's status but that his advancement was automatic, based on length of service (R. 51, 52, 31). However, he admitted that most privates in the army were not promoted, and that his selection doubtless was occasioned by his satisfactory service, his educational background in a technical school—almost equal to university schooling, and his training as a construction (apparently equivalent to civil) engineer (R. 70, 74, 75).

At the time of his original entry into the army in 1928, when he was 20 years old, Patokoski took an oath of allegiance to Finland (R. 49, 30). However, he

denies taking an oath of allegiance in connection with the other two periods of military service (R. 53).

Appellee has admitted that he voted in a Finnish national election on at least one occasion, in 1946 (R. 57, 72, 81, 31). Finding of Fact VIII of the court below made the following observation: "At that time all persons were urged to vote to keep Communists from gaining control of the Finnish Government" (R. 31). This is a fair summary of appellee's explanation (R. 57).

After the war, conditions in Finland were unsatisfactory and appellee decided to come to the United States. He went to the American Consul in Helsinki, 600 miles from his home, and obtained a visitor's visa permitting him to enter the United States temporarily for a period of six months for the supposed purpose of studying construction techniques in this country (R. 54, 32). On February 24, 1947 he arrived in the United States, accompanied by his wife and three children, who also had received visitors' visas, and the family was admitted to the United States for a temporary period of six months (R. 58, 59, 32; Dep. H. 6). To the Consul and the immigration officers appellee represented that he was a citizen of Finland, and did not voice any claim to United States citizenship. At the end of the allotted six month period appellee and his family requested an extension of their temporary stay, but this request was denied (R. 59, 60, 32).

Deportation proceedings were then commenced against appellee and his family, charging them with having remained unlawfully in the United States beyond the period of their sanctioned temporary stay. On April

20, 1949 an order was entered finding them deportable but permitting them to depart voluntarily from the United States within three months. However, they did not leave, and sought to achieve permanent residence through private relief bills and an application for suspension of deportation, all of which were unsuccessful. On July 7, 1955 appellee and his family were notified that if they did not depart voluntarily from the United States by July 30, 1955 the order permitting their voluntary departure would be withdrawn without further notice and they would be expelled from the United States. They did not depart and on December 30, 1955 an order was entered granting them an additional 30 day period, but specifying that if they did not go by then a final order of deportation would be entered (R. 32, 33; Exh. 6). Execution of the deportation order has been deferred pending the outcome of this litigation.

On July 22, 1955 appellee instituted this action for a declaratory judgment of United States citizenship in the United States District Court for the District of Oregon (R. 3). After a trial before Chief Judge McCulloch on October 29, 1956, at which appellee testified and a number of exhibits were introduced (R. 40 et seq.), the court granted judgment on April 1, 1957 upholding the appellee's title to United States citizenship (R. 27-36). The nub of the court's holding is found in its Conclusion of Law II (R. 34):

"The plaintiff could not expatriate himself or lose or abandon his United States of America Citizenship by taking an oath of allegiance to the Finnish Government or by serving in the Finnish Army or by voting in a Finnish election because he did

not know he was a citizen of the United States of America when he did those things, and the plaintiff has not expatriated himself or lost or abandoned his United States of America citizenship by doing those things with such lack of knowledge."

This appeal contests the judgment declaring appellee a citizen of the United States.

APPLICABLE STATUTES

Sec. 401 of the Nationality Act of 1940, 54 Stat. 1168, directed that:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

* * *

"(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

"(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

* * *

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."³

³ While these statutory provisions are controlling here we point out that similar pronouncements are found in the legislation now in effect. Sec. 349, Immigration and Nationality Act of 1952, 8 U.S.C. 1481.

QUESTIONS PRESENTED

- I. Did appellee lose the American citizenship he acquired at birth abroad by performing military service in the Finnish Army?
- II. Did appellee lose such American citizenship by voting in a political election in Finland in 1946?
- III. Was such loss of citizenship precluded because of appellee's assertion that he was not aware of his claim to American citizenship, although he admittedly knew that his father was a naturalized citizen of the United States?

SPECIFICATIONS OF ERROR

The errors specified by appellant are set forth at pages 98 and 99 of the printed record.

SUMMARY OF ARGUMENT

I.

It is not disputed that appellee's father was a naturalized citizen of the United States and that appellee derived citizenship from him at the time of his birth in Finland. The sole question is whether that citizenship was lost.

Appellant does not contend that appellee lost his citizenship by taking an oath of allegiance, since appellee was a minor when the oath was taken. Appellant likewise does not contend that expatriation resulted from the

first two periods of military service, since there was then no law prescribing such loss.

II.

Appellee lost his citizenship under Sec. 401(c) of the Nationality Act of 1940 by his service in the Finnish Army from June, 1941 until October, 1944. The court below did not find that this service was involuntary. However, if the question arises we believe voluntariness is amply established.

The mere fact that the service was performed under a conscription law does not necessarily connote duress. See *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Coumas v. Brownell*, 222 F. 2d 331 (C.A. 9, 1955). Ordinarily duress will be present only when an objection to service by one claiming to be an American citizen is disregarded or when the citizen is terrorized into silence in a totalitarian state. No such circumstances are present here.

Under *Nishikawa v. Dulles*, *supra*, voluntariness is presumed unless it is put in issue. No such substantial issue was raised in the court below.

In any event, the government has met any burden of proof imposed upon it. The record convincingly demonstrates voluntariness because no objection to military service was made, because of appellee's steady advancement in military rank, denoting conspicuously satisfactory service, and because of appellee's clear expression (R. 75-76) regarding his willingness to fight for his country's freedom.

III.

Since appellee admittedly voted in a political election in Finland in 1946 he lost his American nationality under Sec. 401(e) of the Nationality Act of 1940. There is not the slightest suggestion that this exercise of franchise was coerced. The only explanation is that all persons were urged to vote to keep Communists from gaining control of the Finnish Government, and this certainly does not represent legal duress.

IV.

The court's basic premise that appellee could not lose his American citizenship since he was not then aware of his legal status as a citizen seems demonstrably unsound. As a matter of fact the record abundantly shows that appellee always knew of his father's naturalization in the United States. At the very least, he had full knowledge of the facts when he obtained the father's naturalization certificate upon his mother's death in 1945. Yet he voted in a political election in Finland the following year, in 1946.

Knowing these facts, it would have been a simple matter for appellee to have made inquiry to confirm his status. Yet he took no such step and did not mention his possible claim to American citizenship to the American Consul or to the immigration officers, until he was faced with the possibility of deportation.

Even accepting appellee's argument at its maximum, it adds up only to a contention that while he knew

the facts he was unaware of their legal consequences. We believe such a plea must fail.

Although there is no case precisely in point, many analogous decisions can be cited. Most important is *Savorgnan v. United States*, 338 U.S. 491 (1950). There the Court held that the expatriation statutes are expressed in objective terms and provide for loss of citizenship upon the performance of specified overt acts, when voluntarily done, and are not conditioned upon the subject's undisclosed intent or understanding. Other decisions which ratify the same view are *Acheson v. Kuniyuki*, 189 F. 2d 741, 744 (C.A. 9, 1951), rehearing denied 190 F. 2d 897, cert den. 342 U.S. 942; *Acheson v. Wohlmuth*, 196 F. 2d 866, 871 (C.A. D.C. 1952). The same concept was emphatically reiterated by the Supreme Court in *Perez v. Brownell*, 356 U.S. 44, 61 (1958). The majority holding there declared that "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."

The court below consequently erred in finding that expatriation entails a specific intention to relinquish the citizenship right and that the voluntary military service and voting did not result in loss of citizenship.

ARGUMENT

I. Appellant Does Not Dispute the Acquisition of United States Citizenship and Does Not Contend That Such Citizenship Was Lost by Taking an Oath of Allegiance.

In the court below the government conceded that appellee's father was a naturalized citizen of the United States at the time of his birth in Finland in 1907 (R. 7). We do not recede from that concession. However, we point out that although the father unquestionably was naturalized in 1894 his hold on citizenship and residence status in this country was exceedingly tenuous. All told, he remained in the United States only eight years, and left this country two or three years after his naturalization, never to return. Thereafter he continued to live in Finland over 30 years until his death, married and had children, and presumably enjoyed the bounties of Finnish citizenship and residence.

Although subsequent enactments would have divested the father of his claim to American citizenship, no such statute was in effect at the time he forsook the United States in 1896 or 1897. The first legislation was Sec. 2 of the Act of March 2, 1907, 34 Stat. 1228, which declared:

“That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

“When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall

be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe . . .”⁴

resumption of residence in Finland and was in effect only four months at the time of appellee’s birth. Even if we were disposed to argue that its terms were retroactive, no such contention was made in the court below and we do not urge it here.

Consequently we do not deny that appellee’s father remained a citizen of the United States and that appellee derived United States citizenship from his father under Sec. 1993 of the Revised Statutes. It cannot be overlooked that the son’s tie to American citizenship likewise was quite slender, since he was born in Finland and resided there 40 years, enjoyed the privileges of Finnish citizenship, and first asserted a right to American citizenship after deportation proceedings were commenced against him in this country. But these are circumstances which apparently do not impair his original title. The only issue to be resolved in this appeal is whether he subsequently lost his citizenship claim by performing acts of expatriation.

⁴ More positive pronouncements regarding foreign residence by naturalized citizens were made in Sec. 404 of the Nationality Act of 1940, 54 Stat. 1170, and Sec. 352 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1484.

This statute was enacted ten years after the father’s

Appellee took an oath of allegiance at the time of his induction into the Finnish Army, and there is no evidence in the record that he took such an oath on any other occasion. Under Sec. 2 of the Act of March 2, 1907, quoted above, an oath of foreign allegiance normally would forswear United States citizenship. But it appears that appellee was then a few months under the age of 21. In 1928 there was no specific age limitation in the statute. However, it is undisputed that appellee did not lose his citizenship by an oath of allegiance taken during minority even through the oath was uttered in connection with military service which continued after he attained the age of 21. *Soccodato v. Dulles*, 226 F. 2d 243 (C.A. D.C. 1955); *Augello v. Dulles*, 220 F. 2d 344 (C.A. 2, 1955). The oath of allegiance consequently can be excluded from consideration as a cause for expatriation.

II. Expatriation Resulted from the Military Service.

Military service alone did not accomplish loss of citizenship at the time the first two spans of service were undertaken. *De Cicco v. Longo*, 46 F. Supp. 170 (Conn. 1942). However, the third spell of duty was from June, 1941 until October, 1944. Then in effect was Sec. 401(c) of the Nationality Act of 1940, 54 Stat. 1169, which declared that United States citizenship was lost by

“Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.”

Appellee served in the armed forces of Finland when he was admittedly a national of Finland. Such military service in 1941-1944 expatriated him unless that service was involuntary.

No finding of fact or conclusion of law by the trial court can support a thesis that the military service lacked inherent voluntariness. The court assumed that voluntary acts of expatriation were performed, and its ruling is grounded solely on its conclusion that a person cannot lose citizenship unless he is aware of his legal rights, a hypothesis we examine later. However, on other occasions appellee has argued compulsion, and we therefore address this issue.

There was testimony below that a 1950 law of Finland visited criminal penalties on those who violated universal military service requirements (R. 89-90; Exh. 5). but that legislation has no bearing on this case, since it was activated only after its enactment and was not in effect when appellee's military service occurred.

Even assuming that similar penalties were prescribed earlier (see R. 56, 57), they represent no more than the normal sanctions, similar to those in our selective service legislation, a citizen must endure if he disobeys his country's laws. Duress certainly will vitiate an act of expatriation. But duress cannot be predicated alone on the circumstance that military duties are compulsory or universal. See *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Coumas v. Brownell*, 222 F. 2d 331 (C.A. 9, 1955). Ordinarily, the defense of duress will be a factor only if opposition to service by one claiming status

as an American citizen is overridden or when the coercive climate in an authoritarian state stills his tongue and prevents him from asserting his plea for exemption. See *Coumas v. Brownell, supra*.

But no such circumstances are present here. No relief from service was sought. Moreover, the military enrollment was not in a totalitarian state whose repressive measures and secret police might have suppressed the desire to object.

Under the Supreme Court's formulation in *Nishikawa v. Dulles, supra*, the government can rely on a presumption that an act of expatriation was voluntary unless the issue of voluntariness is injected by proof in the record. The Supreme Court indicated that conscription alone does not project an issue of voluntariness, and we believe there is nothing in the record to overcome the normal assumption that a man's actions are deemed voluntary.

But even if we are mistaken in this assumption, it is our conviction that the government has abundantly met the burden of proof imposed upon it. That burden is satisfied when the evidence in the record, viewed in totality, establishes clearly, unequivocally and convincingly that the military service was uncoerced. See *Nishikawa v. Dulles, supra*; *Coumas v. Brownell, supra*.

This is not a case of an American citizen trapped in a dictatorial land, as in *Nishikawa*. Rather it concerns a man born and raised in Finland, who was and always

regarded himself as a Finnish citizen, and who was responding to a call to duty from the democratic government in the only motherland he had ever known.

There is not the slightest whisper of any protest. True, like most conscripts, appellee would have preferred to remain in the comfort and safety of his home. But everyone was required to go, and as a loyal Finnish citizen he answered his country's call (R. 49, 57, 85).

Additionally, the voluntariness of this service repeatedly is attested in the record. In the first place, as we have noted, there was never any vocalized objection to the military service (R. 77, 21; Dep. H. 7). Second, he took an oath of allegiance without protest (R. 49, 50, 76, 77). While this oath related to an earlier period of service, it is an element in the total pattern.

A third circumstance is appellee's steady enhancement in military rank, commencing with private and ending as a first lieutenant. The court below is patently in error in finding that these were the natural reward for longevity of service (R. 31). Not only is such an assumption contrary to all experience, but it directly conflicts with the testimony of appellee himself (R. 74, 75). The military authorities certainly would not have favored him if his services were not conspicuously satisfactory or if there was any indication that he was disloyal, disaffected, or recalcitrant.

Finally, the voluntariness of the service is underscored by appellee's entirely commendable endorsement of the democratic principles of his government,

and his repeatedly expressed wish to support it in its fight for freedom against foreign invaders. The following excerpt from appellee's testimony is enlightening (R. 75-76):

"Q. You were ready at any time over there to fight for Finland's independence, weren't you?

A. Yes, I think so.

Q. You state in a letter to the Immigration Service dated October 25, 1948: 'It is my conviction to uphold what is right and to oppose injustice and tyranny and therefore I have fought for little Finland which was attacked by a great country. The whole world condemned this attack upon Finland. Looking at it from the human point of view how could I have forfeited any possible claims which I may have had to United States citizenship. I am at all times ready to fight for the rights of this country in which I now live if an assault were made against it.'

Now you felt that you were ready at any time, then, to fight for your little country?

A. Yes, that is my feeling because I know nearly every people, every American citizen, will fight to hold freedom."

This willingness to perform military service for Finland is confirmed by his voluntary service in the National Guard of Finland after his military duty had ended (R. 84). And we note that his attachment to his native land extended even to support of its policy in enlisting aid from Nazi Germany during World War II (R. 79).

In our view the record overwhelmingly demonstrates that appellee's military service was not performed under duress of a kind which would vitiate its legal effect.

III. Expatriation Resulted from Voting in a Political Election in Finland.

Under Sec. 401(e) of the Nationality Act of 1940, 54 Stat. 1169, voting in a political election in a foreign state caused loss of United States nationality. In his testimony before the court appellee admitted that he had voted in a national election in Finland, concededly political, on one occasion, in 1946 (R. 57, 81, 82). His testimony reveals a keen awareness of political affairs in Finland and a desire to support his country in its efforts to preserve its independent democratic institutions (R. 71-76). Under the statute this act of voting was itself sufficient to cause loss of American citizenship. However, appellee seeks to elude this consequence by contending that he was compelled to vote. The only compulsion he has described, however, consisted of public pleas urging everyone to aid in preserving the Finnish Government from the Communists (Id.) The court describes appellee's situation in its Finding of Fact VIII (R. 31):

“The plaintiff voted in the general political election in Finland in approximately 1946. At that time all persons were urged to vote to keep Communists from gaining control of the Finnish Government.”

It is evident that no legal duress has been established. Similar claims of moral compulsion were rejected in *Acheson v. Kuniyuki*, 189 F. 2d 741 (C.A. 9, 1951), rehearing denied 190 F. 2d 897, cert. den. 342 U.S. 942; and *Acheson v. Wohlmuth*, 196 F. 2d 866 (C.A. D.C. 1952). These cases involved respectively voting in Japan

and Germany at the time they were occupied by American military authorities. The affected individuals contended unsuccessfully that the voting was undertaken at the urging of the occupying American officials. If duress did not exist under such circumstances, then it could hardly be found when the voting took place in a country not under military occupation.⁵

Here we do not have a voting ritual performed at the command of a police state. Appellee admitted and emphasized that during the critical periods Finland was a republic, in which the normal democratic processes functioned. No one compelled him to vote and his motivation, laudable enough, was to do his part in improving his country's lot. By any rational test appellee cast his ballot freely and voluntarily.

IV. Expatriation Was Not Avoided by Appellee's Ignorance of the Legal Consequences of His Actions.

The trial court's sparse opinion apparently assumes that appellee had committed at least one act of expatriation but found that he "did not know that he was a citizen at the time he did the things which were alleged to have cost him his citizenship" (R. 27). Observing that this was a case of first impression, the court took the position that expatriation entailed the intentional relin-

⁵ Special legislation has permitted expeditious resumption of American citizenship by those who lost such citizenship through voting in political elections in Italy immediately after World War II. See Act of Aug. 7, 1946, 60 Stat. 865; Act of Aug. 16, 1951, 65 Stat. 191, as amended by Sec. 402(j), Immigration and Nationality Act of 1952, 66 Stat. 278.

quishment of a known right. The court's view is reflected in its Conclusion of Law II (R. 34):

"The plaintiff could not expatriate himself or lose or abandon his United States of America Citizenship by taking an oath of allegiance to the Finnish Government or by serving in the Finnish Army or by voting in a Finnish election because he did not know he was a citizen of the United States of America when he did those things, and the plaintiff has not expatriated himself or lost or abandoned his United States of America citizenship by doing those things with such lack of knowledge."

The court's reasoning would have been more plausible if it appeared that appellee never knew that his father was a citizen of the United States. But the record decisively refutes such a supposition. In the deportation hearing appellee testified that he remembered his father stating he was a citizen of the United States and could return to the United States at any time if necessary and that appellee himself never sought the shelter of American citizenship, since he never "dared to make that claim, but it has always been sort of a thought in my mind" (Dep. H. 5). In his court testimony he likewise stated that his father had told him that the father had become a citizen of the United States during his brief residence in this country (R. 48). He also declared in his court testimony that he first saw his father's naturalization papers for United States citizenship when his mother exhibited them to him a week before her death (R. 54). The court concluded that he had found the naturalization certificate among his mother's personal belongings, shortly after her death in 1945 (R. 31).

We believe the record necessarily supports a finding that during all his years of maturity appellee knew that his father had been naturalized in the United States. At the very least it is certainly established as a fact, and found by the court, that he knew in 1945 that his father had been naturalized in the United States. Yet he voted in a political election in Finland the following year, in 1946.

Appellee alleges, however, that neither his father nor anyone else ever informed him that he himself might have title to United States citizenship. Obviously appellee, a man with solid educational background, for many years harbored a belief that he had such a claim, since he has testified that "it has always been sort of a thought in my mind." Moreover, it seems evident that in finding his father's naturalization certificate and bringing it with him to the United States appellee evidently hoped that the certificate might be useful to him at some future time. It seems to us that under these circumstances appellee had a duty to inquire and that he cannot shield himself behind a wall of silence. Although a visit to the nearest American Consulate in Helsinki would have involved a hard journey, it would have been easy enough to address a written inquiry to the Consulate. When appellee wanted a visa he took the necessary trip to Helsinki, but made no mention of his possible claim to American citizenship. It seems to us that appellee was chargeable with knowledge of the rights he could have claimed.

However, even if we were to accept appellee's thesis, it adds up only to an asseveration that he was aware

of his father's status as an American citizen but not of his own derivative rights through the citizenship of his father. Stated differently, his position is that he knew the facts but was unaware of their legal implications.

Familiar authorities tell us that such a plea must fail. For a person who knows the facts is charged with knowledge of their legal consequences. The statute has fashioned objective formulas for the acquisition of United States citizenship and for its loss. A person who knows the facts cannot avert the legal effects of his actions by a plea that he was not aware of those consequences.

We have been unable to find any case completely in point. However, there are a number of analogous precedents. The fountainhead authority, of course, is *Savorgnan v. United States*, 338 U.S. 491 (1950). There a woman was deemed to have lost her American citizenship by taking an oath of allegiance and by accepting naturalization in a foreign state, even though she contended that she had not intended to give up her American citizenship and had not understood that she was doing so. The Court found (p. 499) that

"... the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them."

And the Court went on to state (p. 500) that a person cannot "preserve for himself a duality of citizen-

ship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act." In *Savorġnan* the Court followed its earlier holdings in *Mackenzie v. Hare*, 239 U.S. 299 (1915).

Later decisions have adhered to this conception. Thus, in *Acheson v. Kuniyuki*, 189 F. 2d 741, 744 (C.A. 9, 1951) this Court rejected a plea that a dual national at birth who had voted in Japanese elections was unaware that she thereby lost her United States citizenship. The Court said:

"The fact, if it be a fact, that she did not intend to lose her nationality and did not know that she would lose it if she voted in these elections is immaterial."

In applying for a rehearing Kuniyuki objected to the Court's statement that knowledge of consequences was not essential. However, this Court denied the application, 190 F. 2d 897 (C.A. 9, 1951). The Court declared that its finding was required by *Savorġnan*, and quoted from the Supreme Court's opinion in that case. Moreover, the Court also observed that the Supreme Court's statement that the expatriation standards are expressed "objectively" merely condensed the more detailed exposition of the lower court in the *Savorġnan* case, 171 F. 2d 155, 159:

"Nor is the fact that she was misinformed or mistaken as to the legal consequences of her conduct of any significance here. One cannot avoid the force of a statute by asserting a mistaken conclusion as to its sanctions or effects. If these factors were permitted consideration, the operation of the statute would depend not upon the voluntarily performed act of becoming naturalized in a foreign

state, but upon the extent of the legal knowledge and the subjective intention or motivation of the person involved. Such tests cannot be used to determine the operation of the statute."

After discussing the opinions in the *Savorgnan* case this Court went on to observe in the *Kuniyuki* reargument that these opinions were "but a restatement of the ancient rule that ignorance of the law is no excuse. Nor may facts which show no more than a possible ignorance of the legal consequences of appellee's acts be made no serve as proof of compulsion." The Supreme Court denied certiorari, 342 U.S. 942.

A similar situation was before the court in *Acheson v. Wohlmuth*, 196 F. 2d 866, 871 (C.A. D.C. 1952), which also involved voting in alleged ignorance of the consequences. The court said:

"A person cannot avoid the consequences which Congress has attached to his overt acts by claiming ignorance of the law or a contrary intention on his own part in performing those acts, even though loss of citizenship is the result."

Of course, the most recent authority is *Perez v. Brownell*, 356 U.S. 44, 61 (1958). The Court there ratified its earlier holding in *Savorgnan* and observed:

"But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. The Court only a few years ago said of the person held to have lost her citizenship in *Mackenzie v. Hare*, supra: 'The woman had not intended to give up her American citizenship.' *Savorgnan v. United States*, 338 U.S. 491, 501, 70 S.Ct. 292, 298, 94 L.Ed. 287. And the latter case sustained the denationalization of Mrs. Savorgnan although it was

not disputed that she 'had no intention of endangering her American citizenship or of renouncing her allegiance to the United States.' 338 U.S., at page 495, 70 S.Ct. at page 294. What both women did do voluntarily was to engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent."

We believe these holdings and expressions ineluctably reject the basic assumption of the court below that expatriation entails a specific intention to relinquish the citizenship right. On the contrary, the grounds for expatriation are stated objectively and do not depend on the citizen's intentions or wishes. Since appellee performed uncoerced military service and voluntarily voted in a foreign election he has committed acts of expatriation within the statutory design.

CONCLUSION

It seems evident that appellee's tie to the United States, slender at best, was severed by at least two distinct acts of expatriation. Each was voluntarily performed and, under the statutory injunction, resulted in the loss of his claim to United States citizenship. This is not a case involving a native born citizen, whose constitutional birthright is jeopardized. Since appellee was born outside the United States, any status he may have inherited from his father emerges from a legisla-

tive grant and he is equally subject to the statutory edict divesting him of American citizenship. We note also that rejection of his claim would not make appellee stateless. It would merely confirm what to him was an established fact, acted on throughout his entire life, that he is a citizen of Finland.

We respectfully submit that the judgment declaring appellee to be a citizen of the United States is clearly erroneous and should be reversed.

Respectfully submitted,

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EXHIBITS ADMITTED INTO EVIDENCE

Exhibit No.	Offered	Admitted
1	R 61	R 61
2	92	92
3	92	92
4	92	92
5	92	92
6	93	93

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM P. ROGERS, as Attorney General of the
United States of America,

Appellant,

v.

URHO PAAVO PATOKOSKI,

Appellee.

*Appeal from the United States District Court
for the District of Oregon.*

BRIEF OF APPELEE

FILED

APR 20 1959

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United States
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WILLIAM P. ROGERS, as Attorney General of the
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v.

URHO PAAVO PATOKOSKI,

Appellee.

*Appeal from the United States District Court
for the District of Oregon.*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This case was brought under the provisions of the United States Nationality Act of 1952 for the purpose of securing a judgment declaring appellee a national and citizen of the United States of America.

Appellee's father, Matti Niemela, was a citizen of the United States of America by naturalization in 1894. In either 1896 or 1897, Matti Niemela returned to Finland from the United States, and was married in Finland. Appellee was born in Finland on July 19, 1907, as issue

of such marriage. Appellee's father did not return to the United States, and died in Finland in 1928. Appellee's mother died in Finland in 1945. Appellee lived in Finland from the date of his birth until 1947, when he and his family came to the United States.

Appellee was married in Finland, and three sons, now aged 20, 18 and 15 years, have been born as issue of such marriage.

Although appellee knew that his father was a naturalized citizen of the United States of America, the citizenship of the appellee was not discussed in the family circle and appellee did not know he was a citizen of the United States by birth. Appellee's home in Finland was approximately 500 miles from the nearest United States Consul's office at Helsinki.

Appellee served in the Finnish Army on three occasions: May, 1928, to May, 1929; October, 1939, to July, 1940; and June, 1941, to October, 1944. All of such service was under the conscription law of Finland.

Appellee voted in one election in Finland, in 1946. All persons in Finland who had the privilege were urged to vote at that election to prevent the Communists from gaining control of the Finnish government.

Among appellee's mother's personal effects, after her death, was the naturalization certificate issued to his father. Appellee brought the certificate with him when he came to the United States, and turned it over to the Immigration and Naturalization Service in Portland, Oregon, at a hearing. Some time later he was

informed by the Immigration and Naturalization Service that he had been a citizen of the United States by birth, but had lost his citizenship by taking an oath of allegiance to the Finnish government upon his first entry into the military service of that government. From the time appellee knew he was a citizen of the United States by birth, he has contended he has never lost such citizenship by expatriation.

SUMMARY OF ARGUMENT

I.

The government suggests that appellee's citizenship by birth and up to 1941 is based on a "slender" or "tenuous" claim. However, the government admits that appellee was a citizen up to 1941.

II.

The government contends that appellee lost his citizenship under Sec. 401 (c) of the Nationality Act of 1940 by his service in the Finnish Army from June, 1941, to October, 1944.

Since appellee held dual citizenship, his conscription into the Finnish Army establishes *prima facie* that his service was involuntary, and the burden of proving voluntary service falls on the government. The government has failed to carry such burden here. Under such circumstances appellee has not expatriated himself. In this kind of case, instituted for the purpose of depriving appellee of the precious right of citizenship previously

conferred, the facts and the law should be construed as far as is reasonably possible in favor of the citizen. See *Perkins v. Elg*, 307 U.S. 325, 337, 83 L ed 1320, 1327; *Schneiderman v. United States*, 320 U.S. 118, 122, 87 L ed 1796, 1800; *Nishikawa v. Dulles*, 356 U.S. 129, 135, 2 L ed 2d 659, 664; *Lehman v. Acheson*, 206 F. 2d 592; *Yoshida v. Dulles*, 116 F. Supp. 618; and *Okimura v. Acheson*, 111 F. Supp. 303.

The majority of the cases support the view that military service for a foreign state under conscription laws under circumstances where protest would be useless is involuntary, and that military service for a foreign state will not result in expatriation unless such service is clearly shown to have been voluntary. See *Mandoli v. Acheson*, 344 U.S. 133, 97 L ed 146; *Acheson v. Maenza*, 202 F. 2d 453; *Okimura v. Acheson*, 111 F. Supp. 303; *Terada v. Dulles*, 121 F. Supp. 6, *Lehman v. Acheson*, 206 F. 2d 592; *Yoshida v. Dulles*, 116 F. Supp. 618; *Genshimer v. Dulles*, 117 F. Supp. 836; *Riccio v. Dulles*, 116 F. Supp. 680; and *Tomasicchio v. Acheson*, 98 F. Supp. 166.

III.

The government further contends that since appellee voted in a political election in Finland in 1946, he lost his United States citizenship under Sec. 401 (e) of the Nationality Act of 1940. Courts that have considered this question under like circumstances as existed here have concluded that voting in a political election in a foreign state does not cause loss of United States citizenship for the reason that voting under such circumstances is voting under legal compulsion amounting to

duress. See *Tomasicchio v. Acheson*, 98 F. Supp. 166; *Uyeno v. Acheson*, 96 F. Supp. 510; *Furuno v. Acheson*, 106 F. Supp. 775; *Naito v. Acheson*, 106 F. Supp. 770; and *Okimura v. Acheson*, 111 F. Supp. 303. Furthermore, a person holding dual citizenship may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. See *Kawakita v. United States*, 343 U.S. 717, 96 L ed 1249; *Okimura v. Acheson*, 111 F. Supp. 303; and *Riccio v. Dulles*, 116 F. Supp. 680.

IV.

The government also contends that the lack of knowledge on the part of the appellee of his status as a citizen of the United States does not prevent his expatriation as such citizen, if appellee has *voluntarily* committed acts which cause expatriation. The trial court held that since the appellee did not know he was a citizen of the United States at the time he did the things which have been alleged cost him his citizenship, he cannot be held to have given up something he did not know he had. The trial court's reasoning was that "expatriation" and "abandonment" are used interchangeably in the decisions bearing on this issue and that to constitute expatriation or abandonment there must be an "intentional relinquishment of a *known* right."

Appellee in this case did not *voluntarily* perform military service for a foreign state, or *voluntarily* vote in a political election in a foreign state, as has been recognized in many decisions hereinbefore cited, but more than this, he did not *know* he was a citizen of the United States when he performed such military service

and when he voted. In the cases cited by the government the citizen knew he was a citizen when he did the act of expatriation, but pleaded ignorance of the law as to the effect of his act. What the trial court said in effect was: a person cannot give up something he does not know he has—he has to have an opportunity to claim what he has after he learns it is his.

ARGUMENT

I. Appellee Was a United States Citizen by Birth

Since the government admits that appellee was a citizen of the United States by birth and up to his entry into the military service of the Finnish government in 1941, no argument is deemed necessary on this point.

In its argument the government has said that appellee first asserted a right to United States citizenship after deportation proceedings were commenced against him in this country. This supports the contention of the appellee that he did not know he was a citizen of the United States until he had been so advised by the Immigration and Naturalization Service subsequent to a hearing at which he had produced his father's certificate of naturalization, and that since such time (April 20, 1949) he has contended he was a citizen of the United States.

II. Expatriation Did Not Result from Military Service

Whether appellee's military service in the Finnish Army from June, 1941, to October, 1944, was voluntary or not must be determined from all the circumstances

attendant to such service, including the factor of his lack of knowledge that he was a citizen of the United States. The issue of appellee's military service was covered at the trial, both on direct and cross-examination. The trial court made no finding whether such service was voluntary or involuntary, and did not assume that such service was voluntary as appellant argues.

The conscription law of Finland, as in evidence here, was in effect during each of the times that appellee was in military service in Finland. As appears from the exhibit (Ex. 5) the 1950 codification was merely a recodification of the prior existing law, and a prior recodification in 1932 was of the same prior existing law which had been in effect since 1923.

Military service in the Italian, German and Japanese Armies under conscription laws in those foreign states has been ruled as being *prima facie* involuntary. In *Mandoli v. Acheson*, *supra*, the government was forced to abandon its contention that military service by a citizen in the Italian Army in 1931 resulted in expatriation, because the Attorney General of the United States had ruled that such service in the Italian Army, by one similarly situated could only be regarded as having been taken under legal compulsion amounting to duress! The Attorney General said (quoting from *Mandoli v. Acheson*, *supra*, page 135), "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." To the same effect is *Genshimer v. Dulles*, *supra*, involving a citizen having dual United States and German citizenship, and

Nishikawa v. Dulles, *supra*, involving a citizen having dual United States and Japanese citizenship. There are numerous other cases to the same effect involving citizens having dual United States and Japanese citizenship.

Since the decision in Perkins v. Elg, *supra*, as affirmed in Nishikawa v. Dulles, *supra*, it has been the law that no conduct of the citizen results in expatriation unless the conduct is indulged in voluntarily. Military service for a foreign state by a citizen holding dual citizenship in the United States and such foreign state is *prima facie* involuntary, and it becomes the burden of the government to prove by clear, convincing and unequivocal evidence that the military service was voluntary. Here, all of the evidence is to the contrary. Appellee was first called to serve before he became of age, and again during the Finnish-Russian Winter War, and lastly during the 2nd World War. All of such service was under the conscription law. Every able-bodied man in Finland had to serve. If a man didn't serve, he would be put in prison (Ex. 5; R. 57, 90). Appellee sought no advancement in the military service—whatever advancement he received was due to his education, his experience in construction work, and length of service. Although Finland was not a totalitarian state, its manpower was small, and severe penalties accompanied refusal to serve. Underlying all these facets of the situation, appellee was a citizen holding dual citizenship, without knowledge that he was a citizen of the United States, and without any way to get out of Finland after 1939, when the 2nd World War really began, and

because of his dual citizenship, owing a duty to Finland to serve in its military service, if called upon.

Obviously, the government has failed to sustain the burden of proof.

III. Expatriation Did Not Result from Voting

Voting by dual citizens, under similar circumstances as here, has been held to be voting under duress—not necessarily duress resulting from physical force or threats, but, as said in *Uyeno v. Acheson*, supra, at page 517, “there may be a type of public coercion which renders an act involuntary, *although it does not stem from the use of force.*” (Emphasis by the court). The same case, at page 519, draws a distinction between persons given a deliberate choice between acts which express allegiance to the United States or allegiance to a foreign state, who makes a free choice, *with full knowledge* (emphasis ours), and who should, under the circumstances be held to its consequences, and persons without any knowledge of the ways, laws, customs or privileges of the United States—who are citizens of the United States by birth, but have never lived there—who, under public pressure, are urged to vote, and because of such circumstances cannot be said to have acted voluntarily.

Appellee testified (R. 57) that in order to prevent the Finnish Communists and Russian Communists from taking over the Finnish government right after the close of the 2nd World War, everyone who had the privilege was asked to vote, and election propaganda required it, and that was the reason he voted. It must be

remembered that at this time he did not yet know he was a United States citizen, and had no knowledge of his rights as such.

The government at one time acquiesced in the view that appellee's voting in Finland would not have affected his United States citizenship, as expatriation under Sec. 401 (e) of the Nationality Act of 1940 cannot be brought about unless the voting was voluntary and free from legal compulsion or duress. (Ex. 6, Order of Immigration and Naturalization Service dated April 20, 1949, page 3). The testimony of the appellee at the hearing which preceded such order convinced the Immigration and Naturalization Service that appellee voted under legal compulsion.

In *Kawakita v. United States*, *supra*, where the citizen was being tried on a charge of treason with his life at stake, and where he was urging that he had renounced his United States citizenship in favor of Japanese citizenship, the Supreme Court of the United States acknowledged the doctrine of dual nationality, and held that the accused had not expatriated himself by various acts, including actual renunciation of United States citizenship, which were voluntary.

In *Riccio v. Dulles*, *supra*, the citizen (who held dual citizenship in the United States and Italian government) was conscripted into the Italian Army while a minor, was required to take an oath of office, was called again into military service in 1939, and voted in Italian elections in 1949. He made no formal protest to military service or the oath of allegiance. The court

said (at page 682): "There cannot be expatriation because of the confirmation of these acts (military service, taking oath of allegiance and voting) unless the intention to relinquish citizenship was clear. 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance' (citing *Perkins v. Elg*, *supra*), and 'proof to bring about a loss of citizenship must be clear and unequivocal.' Common knowledge of conditions prevailing in Italy at the times in question lends credence to plaintiff's testimony that he acted as a result of duress."

Appellee submits that upon application of the test of voluntariness, it is apparent his voting took place under circumstances amounting to compulsion and legal duress.

IV. Appellee's Actions Without Knowledge of His Rights Did Not Result in Expatriation

The government argues that since appellee knew that his father was a citizen of the United States that appellee must have known he had some derivative rights and should be charged with knowledge of such rights. It must be borne in mind, however, that we are dealing with a man who had never been in the United States, who had no knowledge of our customs, laws or mores, who had never been taught to stand up for his own rights, and who had never known, until the Immigration and Naturalization Service in the United States, in 1949, told him so, that he was a United States citizen. Appellee grew up in the country which had conscription long before the United States had it; he was taught to

serve and endure in silent compliance with the laws and requirements of superiors. He lived a long distance from the nearest American Consul. When at long last, after the 2nd World War, he had an opportunity to come to the United States as an immigrant, which he could have done by waiting six more months, he learned that he was on a list of alleged war criminals wanted by the Russian government (R. 55, 56) and he therefore decided to leave Finland as quickly as possible and obtained a student visa. He brought with him a document which he thought might be important—his father's certificate of naturalization. He applied for an extension of his visa, and after a long period of time, this was denied. A deportation hearing was then held, and at this hearing the certificate was handed to the Immigration and Naturalization Service hearing officer. Later, appellee was told he had been a citizen but had lost his citizenship by taking an oath of allegiance to the Finnish government. This the government now concedes was erroneous, as appellee was a minor when he took such oath. Private bills were introduced in Congress for the relief of appellee and his family. One of the bills was passed by the Senate but died in the sub-committee of the Judiciary Committee of the House. Appeals under all applicable provisions of the law to the Immigration and Naturalization Service resulted in denials of relief. This case under the Nationality Act was instituted as a last measure. After a hearing on the merits, the trial court found that there was no intentional abandonment of United States citizenship by appellee by any of the alleged acts of expatriation committed by appellee be-

cause he didn't know he was a United States citizen and therefore couldn't have intended to lose something he didn't know he had. Analogous situations, so well established that no citations are deemed necessary, are: Limitations of actions based on fraud will not run until the fraud is discovered; persons under an incapacity or disability will not be held to strict performance as to time, until the incapacity or disability is removed; buyers are usually afforded an opportunity to inspect before they are bound to buy; marriages may be annulled where one party doesn't know that the other was unable to contract marriage, even though the marriage has been consummated and the incapacity isn't discovered until later.

The government contends that a citizen can lose his citizenship even though he does not intend to do so and cites four cases in support of such contention. A close examination of such cases, however, reveals that in each of the cases the citizen committed a *voluntary* act of expatriation, and that in each instance the citizen *knew* that he was a citizen of the United States. In this case, appellee did not know he was a citizen of the United States when he committed the acts which the government claims resulted in his expatriation as a United States citizen, and furthermore neither his military service nor the one act of voting were voluntary, but were committed under legal compulsion. This is not a situation where appellee was ignorant of the law—it is a situation where he did not know he had a birthright. Surely the law protects the innocent.

CONCLUSION

The mere fact that appellee was born in Finland, rather than the United States, does not make his claim to United States citizenship tenuous, or slender, as asserted by the government, nor does it make his citizenship any less dear to him than if he were a native-born citizen. The government has admitted that appellee was a citizen of the United States by birth. Before appellee knew of this citizenship, through no voluntary act on his part, and solely through happenings that could occur to anyone similarly situated, two things occurred which the government says cost him his citizenship. There is no claim that appellee or his family are not worthy of citizenship, or that they have committed acts which obviously would make them unworthy of citizenship. As a person holding dual citizenship (although he did not know of one) appellee's military service and voting were *prima facie* involuntary, and the government has failed to prove by a preponderance of clear, convincing and unequivocal evidence that he has expatriated himself. In addition, appellee could not give up something he did not know he had, until he was possessed of such knowledge, and after he learned he was a citizen of the United States he has always claimed such citizenship and has done nothing which would forfeit it. A person who has had to fight for his citizenship as strongly as the appellee, and who obviously deserves it as much as he does, should not be denied such citizenship on a basis as thin as that of the government's in this case.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 15738 ✓

*See also
Vol. 3081*

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

*Appeal from the Judgment of the United States
District Court for the District of Oregon.*

FILED

MAY 27 1959

PAUL P. O'BRIEN, CLERK

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*Appeal from the Judgment of the United States
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TO THE CIRCUIT JUDGES, THE HONORABLE
MATHEWS, CHAMBERS and HAMLIN, Judges of
the above entitled Court:

Come now the appellants, and each of them,
and respectfully petition the above designated Cir-
cuit Judges (or in the event this matter should be
reheard en banc, the Judges of the above entitled
Court), for a rehearing of their cause and their
appeal, and in support thereof allege that this
Court erred in its opinion and judgment filed here-
in on April 27, 1959, in the following particulars:

1. In failing to pass upon the question of whether or not evidence illegally seized by State officers can be used as the basis of a Federal prosecution.

2. In considering the question of whether the Federal search and seizure herein was lawful, and in the event this question was properly before this Court, in determining that the Federal search and seizure was lawful.

3. In failing to pass upon the question of whether a State court could validly follow and enforce the doctrine announced by the Supreme Court in *Rea v. The U. S.* (350 U.S. 314).

4. In holding that specifications of error No. 12 (action of the lower court in compelling the State officers to testify under threat of contempt) was not properly before this Court and in finding that there was no merit to specification No. 12.

5. In determining that specifications of error Nos. 4, 5, and 6, were not set forth as required by this Court's rules and in further finding that there was no merit in such specifications.

6. In determining that the evidence herein was "amply sufficient," or sufficient at all, to sustain the conviction of each defendant on Counts I and II of the indictment without passing upon the question of whether or not there was an "interception."

7. This Court erred in failing to reverse the conviction of defendants on all counts.

ARGUMENT

Point 1. The Court erred in failing to pass upon the question of whether or not evidence illegally seized by state officers can be used as the basis of a Federal prosecution for the reasons that (a) this Court cannot determine the legality of the seizure of the evidence in a vacuum, and this Court ignored (b) defendants' contention that the state officers seized the evidence for the purpose of enforcing Federal law, and (c) defendants' contention, and the evidence indicating, the "common practice and general understanding" between Federal and state officials by which evidence obtained by state officers indicating a Federal violation would be turned over to Federal officers for prosecution, and (d) the fact that the tapes, when they were seized by the Federal Government, were actually being held by order of a State Court of competent jurisdiction.

This Court, in its opinion (page 8) stated that since the record below shows that there was no participation by Federal officers in the state search and seizure of May 17, 1956, hence, "the question of the lawfulness of the State search and seizure need not be considered." No one has ever contended that the FBI was lurking in the dark outside Ray Clark's home the night it was broken into on May 17, 1956, the night on which the 5 rolls of tape were stolen from his home. This Court, however, has overlooked the fact that the Trial Judge

stopped the defendants from fully inquiring into whether or not there was a valid basis for the Federal search warrant, or whether or not the FBI records would reveal any prior complaint or understanding. His reason was that he considered the question of the validity of the Federal search and seizure **completely immaterial**. The Court's lengthy ruling on this point was quoted in its entirety at pages 44 to 50 of Appellants' brief. At the risk of being repetitious, we will again emphasize certain portions:

First we will quote a portion of the Government's position which appears (at page 313 M.S.)¹ immediately before the quotation in Appellants' brief.

MR. LUCKEY:

" . . . I submit that if there had been no search warrant at all, if these documents had been turned over to the federal authorities on a silver platter by the state officials or had the Government received them in some other manner that did not go to the original illegality, if it was illegal, of the original search and seizure these defendants would be in no position to complaint. . . ."

Again, at the bottom of the page 316 and the top of 317 (M.S.), the Court restated the Government's position as follows:

"THE COURT: In other words, I take it it is your position that this Court's inquiry is not

¹ M.S. refers to the transcript on the Motion to Suppress; Tr. refers to the Transcript of Testimony; Tr. of Rec. to the Transcript of Record, Vol.I.

whether or not—it makes no difference whether or not the federal seizure was pursuant to a valid search warrant.

MR. LUCKEY: That's right. Because I suggest, your Honor, that under the cases if the state authorities who first themselves conducted the illegal search and seizure had handed them over on a silver platter to the federal authorities they would have been admissible. . . ."

The Court then ruled (at page 321 M.S.):

"THE COURT: Well, I am forced to decide it. I have been listening to all of the testimony and I have reached this conclusion: That it does not make any difference in the ultimate end of this matter whether or not the FBI had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal, it has to be on some other grounds under the theory of defendants other than the fact that he held an illegal search warrant. . . ."

And finally the Court stated (at page 323 M.S.), in explaining its ruling to counsel:

"THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis of Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. **This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.**" (Emphasis added)

At page 328 (M.S.) the defendants requested the production of the reports made by FBI agent Sherk with reference to these tape recordings, and finally on page 336 (M.S.) the request was denied.

(See also the initial request made at pages 180 to 183 M.S.)

It was and is the defendants' contention that the FBI agent Sherk, at the time he made the affidavit for the Federal search warrant, knew that the tapes were "stolen" tapes,—in that the State Court had already allowed the motion to suppress and held the tapes to have been illegally seized. When counsel started to inquire as to whether or not he knew that the proceedings to suppress the evidence was pending when he first heard the tapes, the Court sustained the Government's objection that it was irrelevant (M.S. 197):

"MR. CRAWFORD: Question: Did you read the newspapers in regard to this matter on Monday, May 21, 1956?

Answer: Yes, I read the newspapers about this matter every day.

Question: Every day?

Answer: Every day. . . .

Question: Now were you aware at the time you heard the tapes that there was pending in the District Court of Multnomah County, Oregon, a proceeding to suppress certain evidence seized from the residence of Raymond Clark?

MR. LUCKEY: If the Court please, I would object to that as immaterial and irrelevant.

THE COURT: Yes, it is irrelevant."

The matter was discussed between Court and counsel and again at pages 213 and 214 (M.S.) and the Court reiterated its former ruling.

We cannot comprehend by what logic this Court concludes that Clark's undisputed right of posses-

sion which he was enjoying in his home on May 17, 1956, is transmuted into an apparent consent (or at least lack of power to object) to the FBI agent's seizure of these tapes on Sept. 5, 1956. We respectfully urge, and represent, as counsel of this Court, that had the agent been permitted to answer the question and the ones which would have followed, that he would have stated that he was well aware of the fact that the State Court had previously granted the motion to suppress and had ordered the tapes impounded by the Attorney General and that it was from the State Police, who were holding them for the State Court and the Attorney General, that he learned the whereabouts of the tapes on September 5th, 1956.

If a thief cannot pass title to stolen property, how was Clark's right of possession in these tapes disrupted or disturbed? The Government has never challenged **Clark's** right of possession in these tapes nor his claim of proprietary ownership. (See the Government's brief, pages 30 to 32.) The Government contended that Elkins had no standing to object because he had "only indirectly asserted" ownership of the evidence. While we cannot agree with this Court's interpretation of the effect of the statement in defendants' motion of March 25, 1957, —that **it was restricted to the date the motion was filed**, this Court is in error when it states the record does not show that on September 5, 1956, the defendants "owned or had any proprietary interest in the property seized" (Opinion of this Court, p.

9). In the first place their title or claim of ownership had never been disputed, and in the second place in the record defendants **unequivocally** claimed proprietary ownership of the tapes; the following is quoted from the transcript on the Motion to Suppress, at page 286:

“THE COURT: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?”

MR. CRAWFORD: **That’s right.**

THE COURT: Taken under the State’s warrant. **You don’t repudiate that, do you?**

MR. CRAWFORD: **No.”** (Emphasis added)

This Court has placed these defendants in the following position: The trial court held it was immaterial whether there was a federal search warrant (or affidavit therefor) and therefore precluded the defendants from: (1) trying to show whether or not there was Federal participation; (2) whether or not there was probable cause for believing the existence of the grounds on which the Federal warrant was executed; and (3) whether or not the Federal warrant was void. It did this under the “silver platter doctrine.” This Court, in the face of the record showing a written motion in which the defendants claimed to be the owners of the property in question, and in the face of the direct statement by counsel in open court that they claimed proprietary interest in the property, and in the face of the record showing that the tapes were originally seized from Clark’s home after his

home had been broken into, is now holding that the defendants have no standing to challenge the lawfulness of the search and seizure, and now holds that the Federal search and seizure were lawful! How can the illegal breaking, entering and seizing of personal property destroy the defendants' claim of ownership, or Clark's right of possession?

We believe that if the Silver Platter doctrine is still the law (which we deny), it certainly is premised on the lack of participation in, and lack of knowledge of, any illegality on the part of the state officers. It is true the record does not show this pre-existing knowledge on the part of the Federal officers for the reason that the defendants were precluded by the Court's ruling from interrogating the witnesses on this point. This being so, we respectfully submit that the Government's case **must** rise or fall on the validity of the state search and seizure, even if this Court does not choose to follow the Court of Appeals for the District of Columbia in *Hanna vs. U. S.* (260 F.2d 723). The Government, for purposes of the Motion to Suppress, conceded the illegality of the state seizure (M.S. 84).

Argument on Point 2:

This Court erred in considering the question of whether the Federal search and seizure was lawful. We will not reiterate the argument contained above. This Court passed on a question that was **never determined by the Court below** and its theory is

diametrically opposed to that of the lower Court. The lower Court stated it was immaterial whether any Federal process had been issued since the agent received the property on a Silver Platter. In fact it was stated both by counsel and the Court that for purposes of the motion it could be assumed both that the Federal search was illegal and the state search illegal:

(M.S. 84) MR. LUCKEY (discussing the state search and seizure): "I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, **that for the purpose of this matter we may treat it as illegal.**"

(M.S. 316) MR. LUCKEY: "I don't suggest, Your Honor, that the validity of the Government's present possession depends on the (federal) search and seizure as to these defendants. . . ."

(M.S. 317 MR. LUCKEY: "These are subsequent matters of getting them that are **mere formalities** and serve to get them and perhaps by a **more delicate and discreet** manner. But as to the necessity of sustaining the search warrant, I don't for one minute suggest that it isn't a valid search warrant. But my point is that we are wasting time on an inquiry that isn't relevant." (Emphasis added)

The Court's rulings are quoted *supra*, p. 5.

The District Court did **not** deny defendants' motion to suppress on the ground that the defendants had no standing in court to question the validity of the Federal warrant—it **never got to that point** since it held that the validity of the Federal

warrant was irrelevant and made no findings thereon (M.S. 520). This being so, we fail to see how this Court, on an incomplete record, can find the Federal search was valid.

Assuming that the question is properly before this Court, then this Court erred in determining that it was valid because as pointed out above and as tacitly admitted by the Government in the Court below (see *supra*, p. 10, "mere formalities"), the Federal process was a sham procedure to give the Government a color of law in its possession. Does this Court really believe that the Government needed a search warrant to obtain the tapes from the Bank at Milwaukie? Is this Court so naive as to believe that either the state police or the bank manager would not have responded to a Federal subpoena to produce these tapes before the Federal grand jury? Is it not obvious that the sole purpose of the Federal search warrant was to seek to avoid the perils of the doctrine of *custodia legis*?

With all the sincerity at our command, we respectfully suggest that Constitutional guarantees should not be dissipated by a sham proceeding by the United States Government (**McGinnis vs. the U. S.**, 227 F.2d 598; **U. S. vs. Dixon**, 117 F. Supp. 925; and **Gilbert vs. the U. S.**, 144 F.2d 568).

In the **McGinnis** case (227 F.2d 598) the Federal agent accompanied the State Police to the premises in question and on the basis of this visit, executed an affidavit for a search warrant. The Court stated:

“A Federal agent cannot participate in an unlawful search and then on the basis of what he observed in the course of that search, and on that basis alone, go to a United States Commissioner and swear out a search warrant. Such a search warrant, and the evidence procured in the course of a search thereunder would merely be the illegal product of a previous unlawful search by Federal authorities.”
(Citing cases)

The difference between the **McGinnis** case and the case at bar is that here the State authorities delayed their invitation to the Federal authorities, until **the next judicial day after the search**. Does this lapse of time destroy the Constitutional guarantee? Such is the holding of this Court in the case at bar. It is respectfully urged that the possession of the FBI, by means of the Federal warrant, had no more legal effect than the taking possession of stolen property from a thief. The original taking of possession of the tapes by the State officers was an unlawful seizure. What alchemy has dissipated defendants' constitutional right to object? What made it **lawful** possession in the bank or in the Government?

We feel we should comment on this Court's apparent position that the motion of March 25th did not comply with the provisions of Subdivision (e) of Rule 41. We are compelled to call the Court's attention to the provision of Rule 2 of the Federal Rules of Criminal Procedure which, although not adopted by this Court in its rules, is made applicable to this Court by virtue of Rule 54 (a):

“(1) COURTS These rules apply to all criminal proceedings . . . in the U. S. Courts of Appeals; . . .”

The purpose of the rules (Rule 2) is to “provide for the just determination of every criminal proceeding” and “they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.”

We respectfully point out that the motion of March 25th was specifically upon at least one of the grounds set forth in Subdivision (e) of Rule 41, and therefore the Court erred when it stated that the motion was not based on **any** of the five grounds therein specified. If the Court will examine the motion (Transcript of Record, volume 1, # 13, pages 46 to 49) the Court will see that paragraph (b) was “that the search warrant used by said agent or agents of the Federal Bureau of Investigation of Sept. 5, 1956 in seizing said property is and was invalid, illegal **and void** in that it is and was based on an insufficient affidavit of one Ronald E. Sherk, an FBI agent . . . **and that there was not therefore probable cause for the issuance of said warrant.**” (Emphasis added) Is this language not sufficient to advise the Government and this Court that it was urging a violation of at least Subdivision (4) of Paragraph (e) of Rule 41, if not also Subdivision (2)?

More important than the foregoing, is the Court’s intimation that somehow the Federal Rules

of Criminal Procedure have circumscribed the Constitution of the United States and prevent the defendants from raising a Constitutional question. The defendants have always contended and still contend that the use by the Federal Government of illegally seized state evidence violates the 4th and 5th Amendments (Appellants' brief, pages 55 to 62). We will not reiterate the argument heretofore advanced on this point, but we do point out that this Court has ignored it.

We also note that this Court in its opinion (page 9) found it significant that the defendants did not ask for a return of the property to them. We can only point out that had the defendants asked for a return of the property to them, they would have been in contempt of two State Court orders directing that the tapes be turned over to and retained by the Attorney General (Tr. of Rec. p. 65, p. 68). Furthermore, is this Court intending to hold that a Constitutional guarantee would be protected if the accused said, "Please suppress this evidence and return it to me," but is **not** protected if the witness merely said, "Please suppress this evidence"?

Arguments on Points 3 and 4: The Court erred in failing to pass on the question of whether or not a State Court could validly follow and enforce the doctrine announced by the United States Supreme Court in **Rea vs. U. S.**, 350 U.S. 314. This Court erred in treating this as a question of **admissibility** of evidence.

In its opinion (page 10) this Court has stated that it need not consider specification 12 because this specification does not comply with Rule 18, apparently referring to setting forth the “full substance” of the evidence admitted. In the first place the question did **not** relate to the relevancy or materiality of the testimony but whether or not the witnesses should be allowed to give **any testimony at all** concerning what they learned on the night of the illegal raid. The question was raised by objections interpose by the testimony of 7 separate witnesses, and a rough calculation would indicate that the testimony adduced over defendants’ objection occupied something more than 800 pages. Surely the Court does not require a defendant to encumber his brief with some 800 pages of quotation of testimony at an additional cost of at least \$3,000 in order to raise this question. Indeed, a summary of the testimony of these witnesses (which does not purpose to contain the “full substance”) occupied more than 25 pages of the Appendix! Would the inclusion of 25 or 30 additional printed pages summarizing their testimony have aided this Court in determining the question before it?

We apologize for not quoting the precise question and answer on which it was first raised and do so now. There had been considerable discussion between the Court and counsel as to the effect of the restraining order and the restraining order had been read to the entire jury panel as shown in Ap-

pellants' brief at page 74 (Tr. 2 to 28). When the first state officer was called, he was asked the question (Tr. 569):

"Question (by MR. LUCKEY): Now, Mr. Mineally, in connection with your duties as a deputy sheriff, did you have occasion on or about May 17, 1956, to visit the home of Raymond F. Clark?

MR. EVANS: Objection, your Honor, that is one of the matters that is covered in the State Court Restraining Order.

THE COURT: It will be overruled.

MR. EVANS: I would like to be heard on that, Your Honor.

THE COURT: Do you have any new grounds other than what have been discussed?

MR. EVANS: Then all the other grounds we have urged.

THE COURT: Very well. The motion is overruled."

Immediately following this, Mr. Crawford joined in the objection and the Court likewise overruled it (Tr. 570).

The Restraining Order was considered by this Court when Appellants' Petition for a Stay to enable them to file a Petition for a Writ of Prohibition (undocketed petition opinion rendered per curiam from Judges Stephens, Pope and Lehman under date of April 22, 1957, in which this Court stated, in part:

"As for petitioners, their right of appeal from any judgment of conviction will afford them an adequate opportunity for Appellate review of such rights as they may have to an exclusion of this evidence. We are not now required

to express any views as to their right in that respect. . . .”

We respectfully submit that this specification of error and this point **is** properly before this Court, and that since this precise question was reserved by this Court in the case of **Rios vs. the United State** (256 F.2d 173), that it merits more than the statement, “However, we have considered them and find no merit in them.”

We repeat from our main brief: If the Federal Court has the power to enforce Federal policy on Federal officials by enjoining them from taking part in a state prosecution (**Rea vs. U. S.**, 350 U.S. 314), cannot a state court enforce the identical state policy with respect to state officers when they participate in a Federal prosecution? If the question before the Supreme Court in **Wolf vs. Colorado** (338 U.S. 25) was, as stated by Justice Frankfurter, whether or not the state might adopt a substitute for the exclusionary rule without running afoul of **minimal** standards, cannot the state enforce the same right as that of the Federal Government?

Argument on Points 5 and 6: The Court erred in determining that specifications of errors 4, 5 and 6 were not properly before this Court and that they were without merit. Specifications 4, 5 and 6 related to the District Court’s charge to the jury. They, and defendants’ exceptions, were set forth totidem verbis, at pages 100 to 109 of Appellants’

brief. Immediately following these specifications of error, we inserted a preliminary statement (Appellants' brief page 95) pointing out to the Court that the instructions given, requested, and the exceptions thereto, were quoted in their entirety at pages 100 and 103. If this Court, by its decision in the case at bar, means that in every criminal case in which a question of as instructions was raised, the appellant should set forth the **entire charge** of the Court to the jury totidem verbis, then we believe this Court should so state in its rules. Rule 18-D of this Court states in part, "When the error alleged is to the charge of the Court, the specifications shall set out **the part** referred to totidem verbis, . . . together with the objections urged at the trial . . ." In all fairness we believe we have complied with this rule, and if the Court is annoyed for the inconvenience of six pages intervening between the listing of the specification and the beginning of the instructions, we apologize for such annoyance and inconvenience. It had been our fond hope that setting them forth in this manner would make it easier, not more difficult, for the Court to determine the applicable law. (See **Canida v. United States**, 250 F.2d 822, at 824 (5th Cir. January 1958); **Henderson v. United States**, 143 F.2d 681, at 684 (9th Cir. 1944); **Jacklin v. United States**, 231 F.2d 405 (9th Cir. 1956).)

We believe the Court erred in finding there was no merit in these specifications. The Court below instructed as to the language of the statute (U.S.C.

Title 47, Sections 153, 605) and gave a definition of a "wire communication" and the defined interception as set forth in the quoted portion in Appellants' brief at pages 100 and 101. The Court then discussed "divulgence" and "use" and defined those terms. No exception was taken or is urged as to the Court's definition of wire communication nor on the meaning or effect of divulgence, publishing or use. The only exception here was to the definition of "interception." The Court instructed that if a telephone conversation was listened to, either through the instrumentalities of electrical devices or through the human ear, and it was heard by another party, this was one meaning of the word "intercept." This, we believe, was plain error within the meaning of Rule 52 of the Federal Rules of Criminal Procedure. We again repeat that the Trial Court's position assumes interception and then argues that the means of such interception is immaterial. It assumes there is evidence in this case that the recordings could only have been obtained as they were "passing over" the wire. The defendant has no burden of proof in a criminal case. It is the Government's obligation to provide evidence of the fact of interception. It has attempted to do so by lifting itself by its boot straps. It says, "These tapes have telephone conversations. The participants did not consent to their being recorded. Therefore there must have been an 'interception'." This completely begs the question, "Was there an interception?" The test there is "How

were the tapes recorded?" By "interception" or by eavesdropping? The record is silent on this point.

Argument on Point 7: This Court erred in failing to reverse the conviction of defendants on all counts. We will not reiterate the arguments contained in the main brief. Since the Court in its opinion dealt only with Counts 1 and 2, we have directed our attention to only these counts in this petition for rehearing. The other counts were discussed in our main brief, and our objections are again urged.

CONCLUSION

May we respectfully point out (1) although defendants obtained "many" extensions of time for docketing the appeal, these were necessitated by the inability of the District Court court reporter to complete the transcript, due to the press of other business; (2) defendants' counsel were faced with the problem of writing, what they hoped would be, an intelligible brief covering 3,500 pages of testimony and various complex questions and attempted to do so in the manner most calculated to assist the Court in its determination of these questions. In the Government's comment, it apparently had no difficulty with any of the "non-compliances" commented on by this Court in its opinion (Appellee's brief, pages 54 to 57).

It is respectfully submitted that defendants' petition for rehearing should be allowed and the errors hereinbefore noted corrected.

Respectfully submitted,

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
Attorneys for Petitioners-Appellants.

CERTIFICATE OF COUNSEL

I, WALTER H. EVANS, JR., one of counsel for the defendants-appellants in the above cause, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and it is not interposed for delay.

Dated this 26th day of May, 1959.

WALTER H. EVANS, JR.,
Of Counsel for Appellants.

NO. 15763 ✓

*See also
Vol. 3081*

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Appellant,

vs.

RICHARD C. HOY, District Director,
Immigration and Naturalization Service,

Appellee.

APPELLANT'S PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WILLIAM M. SAMUELS
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Los Angeles 33, Calif.

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FILE
MAR 20 1959

NO. 15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Appellant,

vs.

RICHARD C. HOY, District Director,
Immigration and Naturalization Service,

Appellee.

APPELLANT'S PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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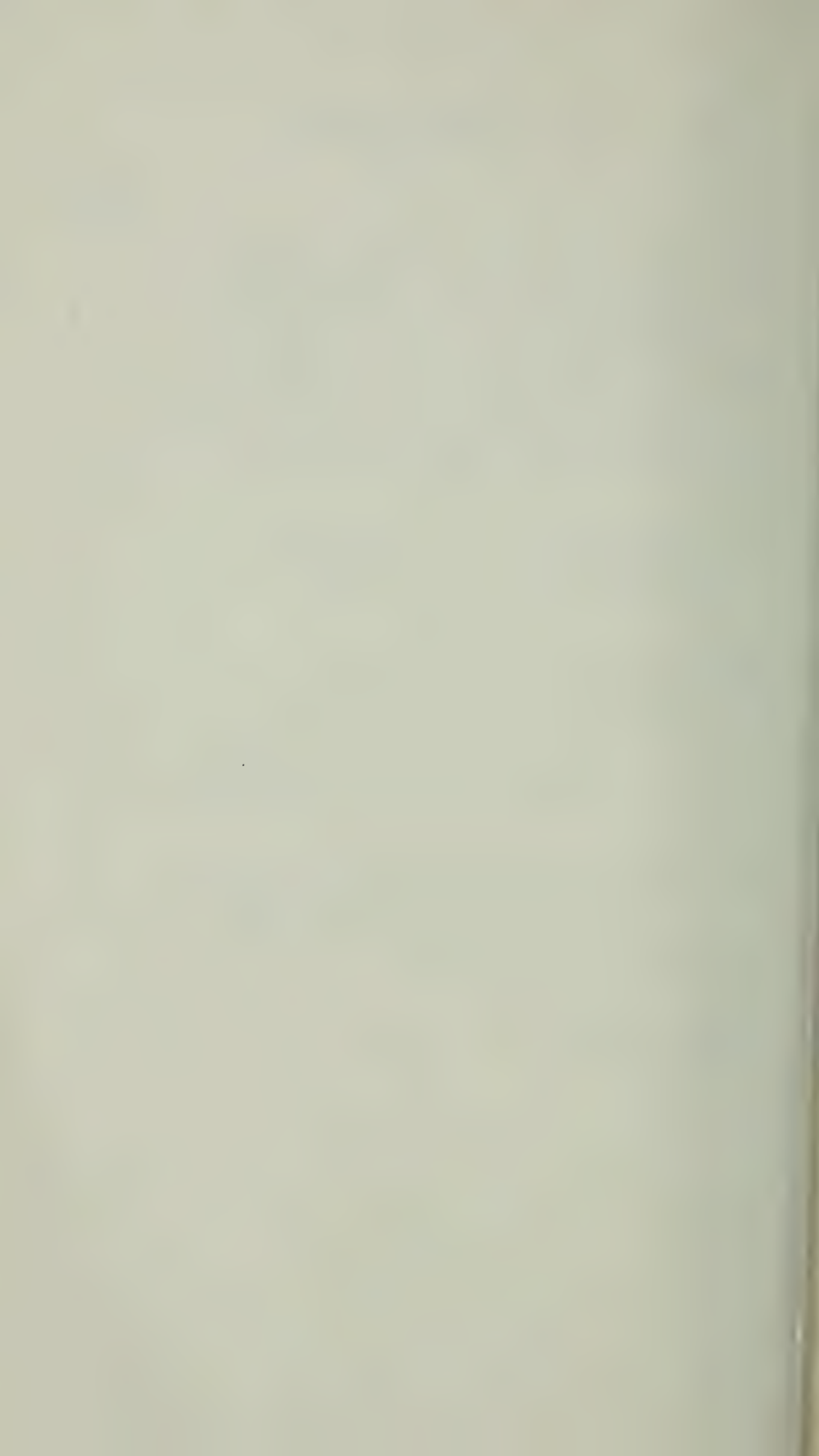


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NO. 15763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Appellant,

vs.

RICHARD C. HOY, District Director,
Immigration and Naturalization Service,

Appellee.

APPELLANT'S PETITION FOR REHEARING

TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT, AND
THE HONORABLE RICHARD H. CHAMBERS,
STANLEY H. BARNES and FREDERICK G.
HAMLEY, CIRCUIT JUDGES:

Appellant, Diamond Kimm, presents this,
his petition for rehearing in the above entitled
cause, and in support thereof, respectfully
urges:

I

IN CONCLUDING THAT APPELLANT HAD BEEN AFFORDED A FAIR HEARING ON THE ISSUE OF DEPORTABILITY, THE COURT FAILED TO CONSIDER THE RECORD OF THE 1950-1951 HEARINGS IN ITS ENTIRETY.

The Court in its opinion at page 11 refers to the remarks of the Hearing Examiner at the beginning of the hearings to support its conclusion that appellant was informed that the issue of his deportability was involved. Isolated from the balance of the record the remarks quoted by the court would appear to support its conclusion. It is apparent, however, from the colloquy that followed shortly thereafter (p. 5 of the 1950 Hearing Record) that the Hearing Examiner was misinformed and did not know the nature and purpose of the hearings when he made the opening remarks. Upon inquiry and discovery in the Service file of the 1949 Assistant Commissioner's order to reopen the proceedings, the Hearing Examiner corrected the information initially imparted to appellant to the effect that a de novo proceeding was contemplated, and appellant was repeatedly informed during the course of the hearings that they were being conducted, pursuant to the order to reopen, for the purpose of determining his eligibility for suspension (pp. 18, 35, 36, 37 and 45 of Hearing Record).

Reasonably construed in its entirety, we believe that the 1950-1951 hearing record demonstrates that the Immigration Service

officers conveyed the impression to appellant that his deportability had already been adjudicated in the prior proceedings and that the sole issue involved in the later proceedings was his eligibility for suspension of deportation. This conclusion is inescapable, we respectfully urge, from the content of the remarks made by the Service officials during the course of the hearings with reference to their nature and purpose, the fact that the 1949 order to reopen was introduced in evidence, the fact that the record of the prior proceedings in 1942 was not offered in evidence nor was appellant interrogated thereon, and from the fact that no attempt was made by the Service Officers to interrogate appellant as to his student status or to otherwise adduce any evidence in that regard.

The vice of the proceedings on which the deportation order is based, we respectfully submit, is that the evidence proffered by appellant in support of his application for suspension of deportation was used by the Immigration Service as the sole basis for its determination of his deportability, and apparently is being so used by the Court, without clearly informing appellant that his deportability was in issue and without warning him in advance of his application for suspension and testimony that the same would be considered and used to determine deportability.

The record of the 1950-1951 hearings, taken in its entirety and fairly construed compels the conclusion, we believe, that there was not merely a lack of emphasis on the issue of deportability, but that it was entirely ignored.

II

THE COURT ERRONEOUSLY CONCLUDED THAT APPELLANT CONCEDED DEPORTABILITY.

We urge that in the circumstances of this case appellant could not reasonably be expected to challenge the deportability charge during the course of the 1950-1951 hearings, and his asserted failure to do so cannot be validly used to adjudicate his deportability by default. Unless appellant was clearly informed that his deportability was in issue and would be determined on the record of those hearings, he was denied an opportunity to explain, rebut and to dispel any impression which may have been created by his testimony. What may have appeared obvious, absent explanation, could conceivably have been dispelled.

Moreover, the hearing record shows that appellant submitted his application for suspension of deportation and testified thereon explicitly without admitting his deportability. (Exh. 4 attached to 1950-1951 Hearing Record).

III

THE COURT'S HOLDING RESPECTING APPLICANT'S ELIGIBILITY FOR SUSPENSION OF DEPORTATION CON- FLICTS WITH PREVAILING AUTHORITY.

In its opinion the Court attempts to distinguish the Konigsberg and Schware cases, cited by appellant as controlling, on the basis that here the "verdict" was not "guilty", but "unproven". The Court appears to conclude, as a basis for distinction, that in Konigsberg and Schware findings of bad moral character were involved, whereas here there was a failure of proof of good moral character.

We respectfully point out that in neither Konigsberg nor Schware was there a finding of bad moral character presented to the Court. In both those cases (Konigsberg, p. 259; Schware, p. 234) it was stated that the refusal to certify petitioners therein was predicated on an asserted failure of proof of good moral character. In those cases, as here, the findings attacked were predicated on an asserted failure of proof of good moral character.

In Konigsberg (at page 262) the Court posed the issue presented as: "Does the evidence in the record support any reasonable doubt about petitioner's good moral character . . . ?" In Schware (at page 239) the Court stated: "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral

character. "

It is plain, we believe, that the nature of the findings attacked and the issues presented for determination in Konigsberg and Schware are precisely the same as in the instant case, and we respectfully urge that the principles announced by the Supreme Court in those cases apply and are controlling here. In those cases, the Supreme Court announced the principle that no inference adverse to good moral character could be drawn from a failure to answer, under claim of constitutional protection, questions concerning political association or belief. The Court there held, in effect, that in the absence of any evidence raising substantial doubts, good moral character is established.

In the instant case it is not even contended that there is any evidence whatever adverse to appellant's good moral character. A fortiori, tested by the principles in Konigsberg and Schware, we respectfully submit, appellant has sustained the burden of establishing the requisite good moral character.

Applying the same reasoning, proof that appellant was not a member of any class made statutorily ineligible for suspension of deportation was demonstrated by the total absence of any evidence to the contrary.

IV
THE COURT ERRONEOUSLY
CONCLUDED THAT THE ISSUE
OF PHYSICAL PERSECUTION
WAS PREMATURE.

We believe that the Court has misapprehended the basis for the relief sought by appellant in opposing deportation to Korea.

The Court's finding of prematurity, we believe, is based on the erroneous assumption that appellant here seeks review on the merits of his claim that he would be subject to physical persecution if deported to Korea. No review on the merits is sought.

Appellant seeks a judicial declaration that his rights with respect to the place of deportation, if deportable, are governed by Section 23 of the Internal Security Act, heretofore cited in appellant's briefs, and not by the pertinent provisions contained in the present Immigration Act (8 U. S. C. A. 1253 (h)). Appellant seeks further, to restrain the Immigration Service from deporting him to Korea, in the event of an adverse determination by the Service on his claim, so that the status quo will be preserved and appellant be thereby enabled to judicially test such determination. Absent such restraint, we believe, there is a real danger that appellant may be deported to Korea without an opportunity to obtain a judicial review of the lawfulness of the place fixed for his deportation, in violation of appellant's legal rights and to his irreparable damage.

On the record, it is clear that the Immigration Service has already directed that appellant be deported to Korea (Exh. A, Doc. 2, Warrant for Deportation). In the absence of judicial restraint and the declaration which appellant seeks here, the Immigration Service may proceed to deport him to Korea summarily, without regard to its final determination on the merits of appellant's claim.

We submit that the Court has jurisdiction to determine the issues here presented and to grant the relief applied for.

CONCLUSION

Appellant therefore respectfully petitions the Court for a rehearing, and in the event that a rehearing be denied, for a stay of the mandate of this Court, to permit appellant to petition the Supreme Court of the United States for a writ of certiorari.

DATED: Los Angeles, California
March 18, 1959

Respectfully submitted,

WILLIAM M. SAMUELS

Attorney for Appellant.

CERTIFICATE OF COUNSEL

The undersigned attorney for appellant certifies that in his judgment the above Petition for Rehearing is well founded and that it is not interposed for delay.

/s/ William M. Samuels

William M. Samuels

Attorney for Appellant.



See also: Vol. 3082
No. 15,805 ✓

**United States Court of Appeals
For the Ninth Circuit**

MAGNOLIA MOTOR & LOGGING Co.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

WILKINS, LITTLE & MIX,

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FILED

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PAUL P. O'BRIEN, CL

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No. 15,805

United States Court of Appeals For the Ninth Circuit

MAGNOLIA MOTOR & LOGGING Co.,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

Appellant herewith submits its petition for a rehearing and in support thereof advances the following points of law to be reconsidered by this court:

I. The acquittal of co-defendant R. Drew Lamb, coupled with prejudicial errors committed by the trial court, negatives the existence of any competent substantial evidence fairly tending to show criminal intent to support a verdict of guilty as to the appellant.

A. The trial court's instruction that Township 11½ was at all times the property of the

United States and that criminal intent could be found if appellant knowingly took property from anyone was erroneous and prejudicial.

B. The trial court's refusal to admit into evidence defendant's exhibit "H" was erroneous and prejudicial.

II. The conviction and sentencing of appellant under the felony Section 18 USCA 641 and 18 USCA 1361 was a violation of due process and equal protection under the federal constitution.

I. THE ACQUITTAL OF CO-DEFENDANT R. DREW LAMB, COUPLED WITH PREJUDICIAL ERRORS COMMITTED BY THE TRIAL COURT, NEGATIVES THE EXISTENCE OF ANY COMPETENT SUBSTANTIAL EVIDENCE FAIRLY TENDING TO SHOW CRIMINAL INTENT TO SUPPORT A VERDICT OF GUILTY AS TO THE APPELLANT.

Appellant respectfully contends that there is a complete lack of competent and substantial evidence showing an independent criminal intent on the part of appellant corporation. This element of criminal intent is the most important factor to be considered by this appellate court and unless proved by competent and substantial evidence the verdict of guilty must be reversed.

This honorable court bases its finding of criminal intent entirely on the actions of R. Drew Lamb, which criminal intent is then imputed to appellant. Appellant contends that not only were certain errors committed by the trial court which were so prejudicial

as to erroneously lead the jury into finding a criminal intent but that the *acquittal* of Lamb wiped out any independent criminal intent of the appellant. This court has not cited one item of proof of an independent intent which is an essential element to be proved by the government. *United States v. Lamb*, 150 Fed. Supp. 310; *Morrisette v. United States*, 342 U.S. 246.

The conviction of appellant must be based on evidence outside the facts so conclusively negated by the acquittal of Lamb. Appellant respectfully contends that the honorable court of appeal has misinterpreted appellant's position with regards to the inconsistency of the verdicts and has overlooked the importance of the language of the case of *Manley v. United States*, 238 Fed. 2d 221, which in effect holds that the reviewing court must be extraordinarily careful to scrutinize the record to ascertain any prejudicial error, and if such other prejudicial error exists to reverse the verdict of guilty.

Appellant has never contended that consistency in verdicts is required. It does earnestly contend, however, that there must be competent and substantial evidence upon which to support a conviction as to the defendant corporation. This honorable court not only has failed to discuss and pass on certain prejudicial errors raised by appellant but also has assumed as did the trial court that the actions of R. Drew Lamb, appellant's president and duly authorized agent, were criminal acts knowingly and wilfully done, albeit that said R. Drew Lamb was *acquitted* by the jury.

Where is the presumption of innocence? How can this court base its determination that there was sufficient evidence of a criminal intent on the part of appellant solely on the activities of Lamb, when the jury has determined that in spite of the overwhelming proof of action on the part of Lamb, which this court has said was done "wilfully, knowingly, and with criminal intent," he was acquitted? The jury must have found that Lamb acted on an honest belief, based on a thorough investigation, in reliance on advice of government maps and officials, and could not be held to a higher degree of knowledge than the government itself. If Lamb had no criminal intent, neither did appellant.

This is not a case, as are those cited by this court, where there were other agents or officers of the corporation in addition to the co-defendant, who were responsible for the acts and policies of the corporation.

Here, appellant's conviction, in the face of the evidence presented at the trial and co-defendant Lamb's acquittal, is so illogical that it must be rejected. Appellant earnestly believes that the jury found no criminal intent on the part of either Lamb or appellant but considered the matter as a civil action and attempted to assess the corporation for civil damages for converting government timber. Conduct which is not wilful is not criminal.

A. The trial court's instruction that Township 11 $\frac{1}{2}$ was at all times the property of the United States and that criminal intent could be found if appellant knowingly took property from anyone was erroneous and prejudicial.

Not only is there a complete lack of competent and substantial evidence showing an independent criminal intent on the part of appellant corporation but the trial court in giving the instruction, partially discussed in this court's opinion, in effect instructed the jury to disregard the fact that the survey of the alleged hiatus was not made until 1954 and that Township 11 $\frac{1}{2}$ was not created by the filing of the survey on March 30, 1956, almost two years after the alleged crime was committed. This had a profound effect on the jury and a devastating effect on the defense of appellant.

The instruction negated the showing being made by appellant of its reliance on the maps and advice of competent federal officials. The trial court, in effect, said the efforts on the part of appellant to discover whether or not it in fact owned the land under dispute is "interesting . . . (but not) . . . particularly relevant."

In determining the issue of criminal intent, alone, the jury had a right to consider all of the facts as they related to the title to the land in question. The trial court instructed the jury to disregard all consideration of the survey and possible belief that appellant might have formed that it owned the land, because "as a matter of law, this particular unsurveyed land, which did exist, belonged to the United

States of America.” Its impact on the jury was to direct a verdict of guilty if it should find that cutting or acts of depredation were committed. Further, the court committed error in instructing the jury that they could find the necessary criminal intent if appellant stole property or depredated land owned by anyone other than itself. The necessary criminal intent to be found is the intention to take or depredate United States property.

B. The trial court’s refusal to admit into evidence defendant’s Exhibit “H” was erroneous and prejudicial.

This learned court has not discussed in its opinion the effect of excluding from the jury its right to consider defendant’s Exhibit “H”. Exhibit “H” was a letter written by a responsible agent of the governmental body charged with administering the public lands of the United States, which exhibit admitted that there was no official knowledge of the alleged hiatus. The purpose of admitting such document was to corroborate the prior testimony of defense witnesses who testified that there was a complete lack of knowledge of the existence of the hiatus on the part of the government prior to and during the times charged in the indictment. This is a criminal action wherein specific intent is a vital element. It was error for the court to refuse to admit into evidence any matter which is relevant in proving such a lack of criminal intent. This was but one more prejudicial error to be considered by the appellate court under the doctrine of the *Manley* case, which, coupled with

the acquittal of R. Drew Lamb, would compel this court to reverse the verdict of guilty for failure to prove specific intent as a matter of law.

II. THE CONVICTION AND SENTENCING OF APPELLANT UNDER THE FELONY SECTIONS 18 USCA 641 AND 18 USCA 1361 WAS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION.

Appellant respectfully contends that under the language of the indictment and the proof brought out at the trial, if it be conceded that the necessary criminal intent existed, appellant should have been sentenced under the terms of the misdemeanor Sections 18 USCA 1852 or 18 USCA 1853. Appellant does not make this contention based on the belief that the logs were real property, as stated in this court's opinion, but on the grounds that Sections 18 USCA 1852 and 18 USCA 1853 are specific sections dealing with the course of conduct alleged to have been carried out by appellant. Sections 18 USCA 641 and 18 USCA 1361 are general statutes. Under the doctrine enunciated by Mr. Justice Black in his dissent in the case of *Barra v. United States*, 351 U.S. 131, it is a violation of due process as protected by the Fifth Amendment to the United States Constitution to charge and convict under a specific set of facts, the violation of which is either a misdemeanor or a felony, where the choice is left to the whim of the prosecuting authorities. Here we have specific applicable sections which must control over general sections, *United States v. Chase*, 135 U.S. 255.

Under the logic of the opinion of this court, the government, by electing to prosecute for activity which is prohibited by the specific sections, under general sections covering the same activity, can circumvent the intention of Congress and make a felony out of conduct held by Congress to be a misdemeanor only.

This court has in effect ruled that it is a far greater crime to steal and convert logs from government land than it is to cut the logs, remove and dispose of them from the same public lands. Appellant respectfully contends that the only crime, if any committed, was a misdemeanor in cutting and removing timber from public lands under an honest but (subsequently determined to be) mistaken belief that it bought and owned the land on which the timber was growing.

For the foregoing reasons appellant petitions for a rehearing.

Dated, Sacramento, California,
April 22, 1959.

Respectfully submitted,

WILKINS, LITTLE & MIX,

PHILIP C. WILKINS,

RICHARD N. LITTLE,

SIDNEY E. AINSWORTH,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for appellant R. Drew Lamb. In my judgment the foregoing petition for rehearing is well founded. It is not interposed for delay.

Dated, Sacramento, California,
April 22, 1959.

RICHARD N. LITTLE,
Of Counsel for Petitioner.

**In the United States Court of Appeals
for the Ninth Circuit**

PACIFIC GAMBLE-ROBINSON Co., a Corporation
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the Judgment of the United States
District Court for the Western District of Washington**

BRIEF FOR THE APPELLEE

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FILED

MAR 27 1959

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,818

**PACIFIC GAMBLE-ROBINSON Co., a Corporation
APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the Judgment of the United States
District Court for the Western District of Washington**

BRIEF FOR THE APPELLEE

OPINION BELOW

The oral opinion, findings of fact and conclusions of law of the District Court (R. 48-62) are not officially reported.

JURISDICTION

This appeal involves federal transportation taxes for the period July, 1950, through November, 1950, during which period the taxes in dispute in the amount of \$78,937.17 were paid. (R. 52-53.) Fifteen claims for refund were filed on June 28, 1954

(R. 59), one was rejected on December 23, 1954, one on April 11, 1955, and the remainder on October 6, 1955 (R. 59-60). Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on December 17, 1956, the taxpayer brought an action in the District Court for the recovery of the taxes paid. (R. 3-24.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on September 16, 1957. (R. 63-64.) Within sixty days and on November 8, 1957, a notice of appeal was filed. (R. 64.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Taxpayer paid freight charges for transportation of property solely within the United States by carriers within the United States, by means of checks drawn in the United States on banks in the United States. The checks were mailed to Canada and there manually delivered to the offices of the carriers located outside the United States in an attempt to avoid the transportation tax. The question is whether taxpayer is not required by Section 3475(a) of the Internal Revenue Code of 1939 to pay transportation taxes on such payments despite the unusual method by which they were made.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 3475 [As added by Sec. 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. TRANSPORTATION OF PROPERTY.

(a) *Tax*.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

STATEMENT

This case was tried upon the pleadings (R. 3-31), and a written stipulation of facts supported by various exhibits (R. 31-48). There is no controversy about the facts which are as follows:

The appellant (hereafter taxpayer), Pacific Gamble-Robinson Co. is a Delaware corporation with its principal place of business in Seattle, Washington. It is engaged in the wholesaling of fresh fruits and vegetables and processed food stuffs in the United States, as well as through subsidiaries in Canada. Its main offices were maintained at Seattle, Washington, and at Minneapolis, Minnesota, and it had branch offices elsewhere within the United States. (R. 51-52.)

During the period July through November, 1950, taxpayer received freight bills from various railroad companies in the United States. These bills represented charges incurred by taxpayer upon the transportation of produce and other property upon the rail lines of the railroads from one point in the United States to another between June 30 and October 31, 1950. (R. 52.)

This transportation was mainly in interstate commerce, although a small amount was intrastate, and all payments herein mentioned were made to railroad companies regulated by the Interstate Commerce Commission. Under the regulations of that Commission the freight bills were required to be paid within 96 hours of receipt, and in each instance they were paid within that time. Each of the railroad companies concerned maintained offices at various places in the United States, including Seattle and Minneapolis and other cities at which taxpayer maintained branch offices, at which the freight bills could have been paid. They also maintained offices in Canada. (R. 53.)

During the period in question taxpayer paid freight bills aggregating \$2,605,012.47, together with the three percent tax imposed by Section 3475(a) of the Internal Revenue Code of 1939, as added, in the amount of \$78,937.17 which taxpayer was required to pay by the railroad companies. (R. 53.) These charges plus tax were paid as follows:

(a) Taxpayer's Seattle office drew checks upon its accounts in two Seattle banks, payable to the railroad companies in amounts totalling \$812,810.10 for freight and \$25,164.28 for transportation tax. These checks were mailed to representatives of taxpayer in care of a subsidiary of taxpayer. These representatives delivered the freight bills and checks to duly authorized agents of the railroad companies during regular business hours at their offices in Vancouver, B.C. (R. 54-55.) The salaries of these representatives were paid in part by taxpayer's subsidiary, by whom they were employed, and in part by taxpayer. The above described functions were the only functions which they performed for taxpayer. (R. 56.)

(b) Taxpayer's Minneapolis office drew checks upon its account in a Minneapolis bank, payable to the railroad companies in amounts totalling \$1,620,-321.98 for freight and \$48,619.11 for transportation taxes. These checks were mailed to one McGibbon in Winnipeg, Manitoba. He was employed and paid by taxpayer for the sole purpose of paying the freight bills. McGibbon delivered the freight bills and checks to the agents of the railroad companies during their

regular business hours at their offices in Winnipeg. (R. 56-57.)

(c) Taxpayer's Minneapolis office also drew checks upon its account in a Minneapolis bank, payable to the railroad companies in amounts totalling \$171,880.39 for freight and \$5,153.78 for transportation taxes. These checks were mailed to Peter McKercher in Toronto, Ontario. He was an employee of a subsidiary of taxpayer with offices in Toronto, and his salary was paid by the subsidiary. McKercher delivered the freight bills and checks to the agents of the railroad companies at their Toronto offices. (R. 57-59.)

In each of the above-described situations the agents of the railroad companies accepted the checks in the various Canadian cities, marking them with an ink stamp showing the word "Paid", or words to similar effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to taxpayer's representatives. In each instance the tax so collected was paid by the railroad company concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. In due course the checks were presented to the bank upon which they were drawn and were honored by it. (R. 55-59.)

Taxpayer filed claims for refund for the taxes paid and each claim was disallowed. (R. 59-60.) Thereupon this action for refund was commenced, and judgment entered in favor of the United States. (R. 63-64.) From such judgment the taxpayer here appeals. (R. 64.)

SUMMARY OF ARGUMENT

The issue in the present case is identical and the basic facts are essentially the same as those considered by the Court of Claims in *Kellogg Co. v. United States*, 133 F. Supp. 387 (C. Cls.), certiorari denied, 350 U.S. 903, and those presently pending before this Court for rehearing in *Fisher Flouring Mills Co. v. United States*, No. 15,819, and *Albers Milling Co. v. United States*, No. 15,869. For the reasons which are more fully developed in our brief in the *Fisher Flouring Mills* case, the decision of the District Court is correct and should be affirmed.

ARGUMENT

Taxpayer Is Required By Section 3475(a) of the Internal Revenue Code of 1939 To Pay Transportation Taxes On Shipments of Property Which Were Made Entirely Within the United States, Payments for Which Were Purportedly Made By Unusual Methods Across the Border In Canada for the Sole Purpose of Avoiding These Taxes

The case at bar presents a factual pattern almost identical to that in *Kellogg v. United States*, 133 F. Supp. 387 (C. Cls.), certiorari denied, 350 U.S. 903 and likewise almost identical to that in *Fisher Flouring Mills Co. v. United States*, No. 15819, and *Albers Milling Co. v. United States*, No. 15869, both of which are presently pending before this Court for rehearing. In our brief in the *Fisher Flouring Mills* case we have discussed at length the *Kellogg* decision and have set forth reasons in support of our position that that decision correctly interpreted the provisions

of Section 3475(a), *supra*, of the Internal Revenue Code of 1939. For the same reasons therein set forth, the judgment of the District Court in this case is correct and should be affirmed.¹

In this case, as in the others above mentioned, all of the transportation for which the freight bills were paid took place within the United States. Railroad companies in the United States sent the bills to various offices of the taxpayer located within the United States. Then the freight bills were paid by taxpayer drawing checks, in the United States, upon banks located within the United States. These checks were next mailed to representatives of taxpayer in various Canadian cities who then presented them to agents of the railroad companies. Under these facts we submit to this Court that the mere fact of mailing the checks to Canada and there delivering them to agents of the carriers does not make these amounts fall outside the statutory language, "paid within the United States", as set forth in Section 3475(a) of the Internal Revenue Code of 1939. Indeed, the Government contends that this taxpayer's checks, drawn in every instance on its accounts with banks in the United States, and which would have to be returned to the United States ultimately for payment, did constitute within the meaning of the statute payment

¹ To avoid unnecessary repetition and printing expense copies of the Government's brief in this Court in *Fisher Flouring Mills Co. v. United States* are being served simultaneously with this brief upon this taxpayer's counsel and the arguments contained in that brief are here incorporated by reference.

“within the United States”. See *Kellogg v. United States, supra*.

Section 607 of the Revenue Act of 1950, c. 994, 64 Stat. 906, amended Section 3475(a) with which we are here concerned. When Congress amended this section, it did so with the understanding that it was clarifying, rather than changing, the existing law so far as abnormal situations such as that involved in this record are concerned. See S. Rep. No. 2375, 81st Cong., 2d Sess., p. 25 (1950-2 Cum. Bull. 483, 502), set forth at p. 14 of our *Fisher* brief. As to such abnormal situations, of course, which Congress considered covered by existing law, no need for retroactive amendment was present. The rare instance, however, where payment would have been made outside the United States in the ordinary course of business was not covered and Congress desired to change the law in this respect. Recognizing that it was making this limited change, it therefore enacted subsection (c) providing that the amendments made by Section 607 were applicable to amounts paid on or after November 1, 1950. The failure of Congress to amend Section 3475(a) retroactively, far from supporting the position of the taxpayer, detracts from it. Congress, as evidenced by the legislative history of the amendments, did not believe that it was changing the existing law with respect to the transportation of property of the type here involved. In such a posture, it would have been performing a useless rite in making retroactive an amendment which it felt did not change the statute. On the other hand, recognizing that it was changing the law

in a situation, for example, where a Canadian corporation incurred shipping costs for transportation solely within the United States, it desired to set a specific date in the future on which such a change would become effective.

The peculiar and artificial course of conduct followed by each of the taxpayers in these cases points up the weakness in their cases.² Only by construing the legislative words "within the United States" in a completely inert sense, without any consideration of the balance of the statute, can their position be sustained. The Court of Claims in *Kellogg* and the District Courts in this case, in *Albers* and in *Fisher* have each refused to interpret the statute in a manner which would provide for its self-nullification. This interpretation is correct and in accord with the basic purposes of the statute.

² It should be noted that each taxpayer entered upon this unusual method of paying its freight bills after there was published and well-publicized notice of the viewpoint of the Revenue Service that such methods would not provide exemption from tax. See Treasury Release S-2389 set forth in fn. 3 of our *Fisher* brief.

CONCLUSION

The decision of the District Court in this case was correct and it should be affirmed.

Respectfully submitted,

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MARCH, 1959.

No. 15823

*See also
Vol. 308*

**United States
Court of Appeals**
for the Ninth Circuit

ERIC SOBY, Doing Business as Soby Painting
Co., et al.,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY,
etc.,

Appellees.

**Supplemental
Transcript of Record**

**Appeal from the District Court
for the District of Alaska,
Third Division**

FILED

MAR 29 1959

PAUL P. O'BRIEN, CLERK

No. 15823

**United States
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ERIC SOBY, Doing Business as Soby Painting
Co., et al.,

Appellants,

VS.

LLOYD W. JOHNSON and MAX J. KUNEY,
etc.,

Appellees.

**Supplemental
Transcript of Record**

**Appeal from the District Court
for the District of Alaska,
Third Division**

In the District Court for the District of Alaska,
Third Division

No. A-10,628

UNITED STATES OF AMERICA on the Relation
of and for the Use of ERIC SOBY, d/b/a
SOBY PAINTING CO.,

Plaintiff,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY,
Individually and as Co-partners d/b/a
KUNEY-JOHNSON COMPANY; UNITED
PACIFIC INSURANCE COMPANY OF
AMERICA, Seattle; PACIFIC INDEMNITY
COMPANY, Los Angeles; AMERICAN RE-
INSURANCE CORPORATION of New York;
and TRINITY UNIVERSAL INSURANCE
of Dallas, Texas,

Defendants,

and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Additional Defendant.

SUPPLEMENTAL TRANSCRIPT
OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

October 11, 1956

Appearances:

For the Plaintiff:

EDWARD L. ARNELL.

For the Defendants:

LEE OLWELL and

PAUL R. CRESSMAN.

PROCEEDINGS

EDWARD COLLINS

called as a witness for and on behalf of the defendants, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Olwell:

Q. Will you state your name, please?

A. Edward Collins, C-o-l-l-i-n-s.

Q. And your address, Mr. Collins?

A. 1435 Springdale Place, Seattle, Washington.

Q. And what are you commonly called as a nickname?
A. Bud.

Q. Mr. Collins, what is your present occupation?

A. I work for the Kuney-Johnson Company.

Q. And how long have you worked for Kuney-Johnson?
A. Nine years this month.Q. And in what capacity have you worked for—
A. As an estimator.Q. Pardon?
A. As an estimator.

Q. And have you maintained that same job throughout your work with Kuney-Johnson?

(Testimony of Edward Collins.)

A. Yes.

Q. Now, Mr. Collins, when did you first come to Alaska on any [647-2*] business for Kuney-Johnson?

A. It was in January of 1952. Mr. Johnson and I came up for about two days to Fairbanks.

Q. And when did you have any occasion first to come to Alaska in connection with the Ladd and Eielson jobs? A. In April of 1953.

Q. Now, prior to that time I will ask you had you had anything to do with the estimating of the job or the purchasing or ordering of materials?

A. Yes, I did.

Q. What had you to do with it?

A. I estimated the job; purchased most of the materials.

Q. Now, will you just tell us, please, what you do in estimating a job of this type? What you did in estimating this job?

A. Well, we received the plans from the Corps of Engineers and we take off the quantities that are involved in constructing the building. We give prices on those quantities, prepare an estimate and submit our bid.

Q. Then after the bid is submitted what do you do? A. If we are the——

Q. After the bid is accepted? I will correct that.

A. If we are the successful contractor, then we take the job and go into more detail and try to be as accurate as we possibly can.

(Testimony of Edward Collins.)

Q. And do you then supply the material prices? [647-3] A. Yes. we do.

Q. Now, let's refer specifically to the lumber in Contracts 384 and 385, Mr. Collins. Did you follow the procedure you have outlined in connection with the lumber? A. Yes, sir.

Q. And when you first take the lumber figures off the plans, in what detail did you break them down?

Mr. Arnell: If your Honor please, this is perhaps foundation in nature, but I think it's all immaterial.

The Court: What is the purpose of it, Mr. Olwell?

Mr. Olwell: If it please the Court, it would be correct for me to say it's preliminary and the purpose is this: That I intend to show through this witness how this lumber was ordered, what kind of lumber it was, and the detail with which the lumber was specified. I do not intend to be at length with it, but I thought I would furnish the Court with that.

Mr. Arnell: I would state a further objection and that would be upon the ground that the defendants' own records are here. They are the best evidence and I think they specify what was done and what was ordered.

The Court: Excepting this, counsel, they are not limited to their records.

Mr. Arnell: Well, I think, your Honor, that they

(Testimony of Edward Collins.)

have not, through this witness, impeached their own records.

The Court: I don't think that they intend to do that. [647-4]

Mr. Olwell: That is right, your Honor.

The Court: Objection will have to be overruled for the reason that counsel for the plaintiff in their pleadings have alleged that the defendants did not use the proper materials and certainly they made a big issue of the question of lumber. Objection is overruled. You may answer.

Mr. Olwell: Thank you, your Honor.

Q. (By Mr. Olwell): The question, Mr. Collins, to shorten the matter, is in what detail did you take off the lumber as required on this job?

A. Prior to bidding or after we were the contractor?

Q. Both.

A. Prior to bidding we would take it off as closely as we can from the time that we are allowed and list it into various categories, as far as studs, joists, sheeting, etc., and then we would call up our wholesale lumber people and say that we would like a price of so many thousand feet of 2x4s and 2x10s and so forth, strapped and delivered to the dock. Then they would call us back and give us the prices. After we have the job, then we take it off to greater detail and get it exactly to our best ability.

Q. Now then, going along, Mr. Collins. After the bid was accepted and you had done what you

(Testimony of Edward Collins.)

have just testified to, did you have anything to do with the order for the lumber in this case? [647-5]

A. Yes.

Mr. Olwell: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you what has been admitted in evidence as Plaintiff's Exhibit 6, and the first several documents of which appear to be purchase orders. I would like you to glance at those briefly and tell me, did you prepare those purchase orders? A. Yes, I did.

Q. Now, the purchase orders called for precision cut, I think the phrase is used on there, precision cut pre-nailed.

A. Pre-nailing is not on here. It's nailing of headers, the cripples, corners, and partition studs.

Q. Just tell us what is meant by these phrases, nailing of certain things and precision cut?

A. Precision cutting means to take the piece of wood that we will use, whether it be a stud or other member, and cut it at each end at the same time with a gang saw, they call it. That will give you an exact length of the piece of material to the fraction of an inch.

Q. I will ask you whether or not all of this lumber for the—all the framing lumber, at least, ordered as shown on the purchase orders in Plaintiff's Exhibit 6, was or was not precision cut? [647-6]

A. All the lumber was not precision cut.

Q. How much of it was?

(Testimony of Edward Collins.)

A. I don't know.

Q. Well, in what categories was it precision cut?

A. The joists were not precision cut.

Q. Was there anything else that you recall from memory that was precision cut?

A. The headers, the cripples.

Q. What is a cripple, Mr. Collins?

A. A cripple is a piece of wood beside an opening, whether it be a door or window and it's smaller than the adjacent stud and you put the stud and then the cripple right next to each other. The cripple supports the——

Q. Were any of those pieces of lumber nailed at the mill? A. Yes.

Q. Which ones?

A. The headers, the cripples, and the corner studs and partition corner studs were nailed at the mill.

Q. Mr. Collins, prior to ordering any materials, including lumber, I will ask you whether or not you were familiar with the specifications on this job or these jobs? A. Yes, sir.

Q. Why is there no reference on the purchase order for the lumber as to moisture content?

Mr. Arnell: I object to that question upon the ground [647-7] it calls for a conclusion of the witness, and, further, it is immaterial. The order speaks for itself.

The Court: Will you read the question back, please?

(Thereupon, the Reporter read question Line 25, Page 647-7.)

(Testimony of Edward Collins.)

The Court: Well, that is presupposing the witness knows. Do you know, Mr. Collins?

A. Yes.

The Court: Objection will be overruled. You may answer.

Q. (By Mr. Olwell): You may answer it, Mr. Collins.

A. From the experience we have had with previous construction in Alaska and from what I have been told of the climatic conditions of the town of Fairbanks, that and the intent of the specifications, there'd be no reason to believe that lumber would not be 19 when it arrived at the jobsite.

Mr. Arnell: If your Honor please, I renew my objection and upon the ground—based on hearsay and not personal knowledge of the witness.

The Court: Objection sustained. You may rephrase the question, Mr. Olwell.

Mr. Olwell: May it please the Court, I did not have an opportunity to express myself on counsel's objection. That is certainly not hearsay. It was not offered for the proof or for the purpose of showing the accuracy or proving the truth of what [647-8] was told to him. This witness prepared a purchase order and I inquired of him why he did not include something on the purchase order in this case. He has answered the question why he did not. That was not offered to show that the facts upon which he arrived were true, and, therefore, hearsay is not involved. I think it's perfectly competent testimony. The witness merely stated why he did something or

(Testimony of Edward Collins.)

did not do something. Now, that does not involve hearsay. I am not trying to prove through this witness that the facts that he was told were true or not or if his understanding was true. I am merely showing, as he has testified, why he did or did not do something and I think it's perfectly competent and does not involve hearsay.

The Court: Mr. Arnell.

Mr. Arnell: If your Honor please, first I'd like to have the answer read back before I make my statement, if I may.

(Thereupon, the Reporter read Answer Line 12, Page 647-8.)

Mr. Arnell: If your Honor please, he has expressly said that based upon what he had been told and based upon his experience and what he assumed the specifications to be. Now, certainly, your Honor, he is drawing conclusions. He is basing those conclusions upon what somebody else has told him, and, therefore, I say that the answer should be stricken for the reasons stated. I again state that the witness has not been qualified as an expert to offer such opinions and I think the answer should be stricken. [647-9]

The Court: Well, counsel, Mr. Arnell, I point out to you Mr. Olwell states that he isn't eliciting this testimony from this witness for the purpose of proving the statements he made, only the reasons why he didn't order any moisture content.

Mr. Arnell: If your Honor please, that is the

(Testimony of Edward Collins.)

very essence of our objection. The specifications say that the lumber shall not exceed 19 per cent at the point of shipment and this witness is offered to testify through not only his own personal knowledge but what he assumes, what other people have told him that it wasn't necessary to specify it. Now, I submit, your Honor, that certainly is not the proper offer of proof.

The Court: Well, the court will have to reverse its position and the objection will be overruled with the understanding that it's not made for the purpose of veracity of the statement but for the reason why such was done.

Q. (By Mr. Olwell): Will you state whether or not those were the facts which you relied on or which were in your mind at the time you made out this purchase order for the lumber?

Mr. Arnell: If your Honor please, may the record, for the purpose of brevity, show that I have a continuing objection to this line of testimony?

The Court: Well, if you make an objection to this last question the court will sustain it because counsel said "were those the facts." Now, you reversed your position. [647-10]

Mr. Olwell: I will rephrase it, your Honor.

The Court: And then you may have a continuing objection to this line of questioning.

Mr. Arnell: Except as to form.

The Court: Yes.

Q. (By Mr. Olwell): Mr. Collins, rephrasing the last question. Will you state whether or not

(Testimony of Edward Collins.)

those were the factors upon which you made out that purchase order for lumber shown in Plaintiff's Exhibit 6? A. Yes, sir.

Mr. Arnell: I object to that upon the ground it's a leading question, suggestive.

Mr. Olwell: If the court please, I don't think it was leading and I was trying to clear this up. I am now through with the subject but I do not think it was a leading question. It was merely to state whether or not those were the factors that he relied upon. I think the witness so testified but as the court reporter read the answer back there was some question in my mind as to whether it was definite enough to be in the record as it should be.

The Court: Mr. Arnell, this question was not opening up a new subject but was clarification of the prior subject, and, therefore, objection will be overruled. [647-11]

Q. (By Mr. Olwell): Now, Mr. Collins, you stated you got up to Alaska some time in April of 1953. What was the status of the progress of construction on the job at Ladd when you got there, if you remember?

A. We were about ready to pour our first basement slab.

Q. And do you know whether or not any lumber had arrived?

A. Some lumber had arrived, yes.

Q. Did you thereafter leave Ladd or did you stay for an extended period of time?

A. I was between Ladd and Eielson until the

(Testimony of Edward Collins.)

first part of October. I went to Seattle for a couple of days then I came back.

The Court: Pardon me, counsel. Could I inquire as to what date he arrived? The only information I have so far is he arrived in April. Is that not true?

Mr. Olwell: Yes, your Honor.

A. I don't recall the date. It was after the first shipment of lumber arrived on the job. I don't recall the date.

The Court: Well, was it the first part of April or latter part of April?

A. Latter part of April.

The Court: Thank you.

Q. (By Mr. Olwell): Now, you stated, I think, that you came down to Seattle for a couple of days in October. Did you then return to [647-12] Fairbanks? A. Yes.

Q. And how long did you remain throughout the job?

A. I remained in the Fairbanks area until January of '54.

Q. And then where did you go?

A. Then I went back to Seattle.

Q. Did you come back on the job then?

A. No, sir.

Q. All right. Now, going back to this period commencing with the time of your arrival, Mr. Collins, where was the lumber placed in respect to the job?

A. The lumber was between the field office and—I don't recall the number of the building—but it

(Testimony of Edward Collins.)

would have been the second building. We had a large open area that was to eventually be a parking area and that is where the lumber was first stored.

Q. Then how was it stored, Mr. Collins?

A. It was received from the cars and piled in piles of what we would use first. The studs were piled together and the joists were piled together and the sheeting and various other items and we laid it out systematic so we could easily get it from the piles.

Q. Now, there has been reference in prior testimony to a framing yard? A. Yes.

Q. Did Kuney-Johnson have a framing yard there? [647-13] A. Yes.

Q. What is a framing yard?

A. Our framing yard on this particular job was where we took the piles, the lumber from the various piles and nailed them into partitions; the size of which we could easily lift with a crane and drop into position of the building.

Q. Were those solely interior partitions?

A. No; some were exterior partitions, too.

Q. Let's take the first building, Mr. Collins, and as rapidly as you can just tell us the progress of how that building would be put up, what did you do first and then next and so forth?

A. First of all, we poured the concrete slab. Then we built up the concrete exterior walls. Then we put the joists down and then we used plywood sheeting for the deck. Then we would take the sections that were made up in our framing yard, lay

(Testimony of Edward Collins.)

them down on the deck, nail the outside wall sheeting to that, lift them up, then we would lift the interior partitions over them, stand them up, secure them, fill in with any piece of material that was needed so—that which we couldn't actually do in a framing yard—then we would put the second floor joist on, second floor sheeting in the same procedure up until into the roof.

Q. Now, with respect to the other buildings in the project. I am now speaking of Ladd. Let me ask you whether or not the [647-14] process of construction followed the same general construction as you have described in Building No. 1?

A. Yes; we would have joist crews, sheeting crews, exterior wall crews, interior wall crews, and they would move on to the next buildings.

Q. Would one building be completed before you had started on the next? A. No, sir.

Q. Well, how was that handled, Mr. Collins?

A. The joist crews for the first building, first floor joists, they would lay those then they would move on to the second building. Behind them would follow the sheeting crew and then the partitions. Possibly one building would have the partitions all up and the next building would have just the first floor joists on and so on down the line.

Q. Now, Mr. Collins, were you at Ladd at the time the sheetrock was applied by Story Brothers?

A. Yes.

Q. Did any of the inspectors, Government men, complain to you personally at any time concerning

(Testimony of Edward Collins.)

the sheetrock? A. No, sir.

Q. Did you have any complaint—now I am speaking of yourself personally—did you have any complaint from either Minor Bottorff or anyone in his employ concerning the sheetrock?

Mr. Arnell: If your Honor please, I object to that [647-15] question upon the ground it's leading.

Mr. Olwell: May it please the court——

The Court: Objection is overruled.

Q. (By Mr. Olwell): Did you have any complaint from Minor Bottorff? A. No.

Q. Did you observe the sheetrock while it was on the job? A. Yes.

Q. Where was it stacked or piled?

A. It was stacked in relatively close to the lumber pile. It was between the field office and the, I believe it was the second building.

Q. Did you observe its condition as piled?

A. Yes.

Q. Just what was it?

A. It was piled possibly 16 to 20 feet high and it had tarpaulins over it.

Q. Was any of it damaged? A. Yes.

Q. Did you have anything to do with ordering the—any replacement sheetrock?

A. I wrote the order, yes.

Q. Do you recall, Mr. Collins, when you first ordered any replacement sheetrock?

A. No; I don't. [647-16]

Q. Do you recall when you ordered in respect

(Testimony of Edward Collins.)

to the time when the first shipment arrived and appeared to be damaged?

A. It could have been a month, but I don't remember.

Q. Now, do you know of your own knowledge whether any of the sheetrock was culled?

A. Yes, sir.

Q. How was that done, Mr. Collins?

A. When we were ready to put it in the buildings we would separate the pile as it was, put the bad pieces to one side, the pieces we would use to the other side, take those pieces and lift them into the buildings, into various apartments in each building.

Q. Would there be any later culling in the buildings?

A. Yes; there was later culling. Sometimes we may have gotten a piece in there that was not satisfactory to our superintendant and it would be thrown outside.

Q. Mr. Collins, do you know or have you had occasion to learn and figure from the plans how much of the sheetrock used in each building percentage-wise could be used in full 4x8 sheets?

A. I do know, yes.

Q. Approximately what percentage could be so used?

A. About 40 per cent could be, full 4x8 sheets.

Mr. Olwell: If the court please, may I approach—

The Court: You may. [647-17]

(Testimony of Edward Collins.)

Mr. Olwell: If your Honor please, I have two documents which I wish to mark as exhibits. One consists of two rather small sheets, 8x11, that we will have no problem with. The other consists of 13 pages of drawings which are rather awkward in size. Now, the small sheets contain a computation which is based on the drawings that are shown on the large sheets. The reason for this explanation is as to whether the court wishes two exhibits or one out of this.

The Court: Well, it would appear to the court that one exhibit would be proper. You could make two subdivisions thereof.

Mr. Olwell: If we could do that and if it would be possible—I am inquiring whether it could be stapled? There are a number of exhibits in this case which are not stapled and they are just liable to be all over.

The Court: Well, I suggest that if you staple them together, that is, the first division, namely, the drawings or schematic plan, I suppose is what you would call it, would be stapled together as one unit and the other as a separate unit.

Mr. Olwell: If we could do that and give it the same exhibit number it would not be necessary to give separate numbers to each sheet.

The Court: No. I would then admit that in evidence as Defendants' Exhibit for identification only as Q-1 and -2. The plans being one and the computation is two.

(Testimony of Edward Collins.)

Mr. Olwell: Now, by way of clarification of the plans—— [647-18]

Mr. Wilson: Wait until the witness testifies and identifies it.

Mr. Olwell: Your Honor, the witness can describe them better than I can and much more briefly.

The Court: Yes.

Mr. Olwell: 13 sheets.

The Court: How many yellow?

Mr. Olwell: One yellow and one white. May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you what has been marked for identification as Defendants Exhibit Q, division or part number 1, I would ask you merely to state what that is? I merely wish you to identify it.

A. This is the layout of each room showing the plasterboard and how it was used.

Q. You mean each room where?

A. In each apartment.

Q. And where?

A. At Ladd Air Force Base.

Q. And did you prepare this?

A. No, sir.

Q. Did you check it, however, after arriving up here? A. Yes; I checked it. [647-19]

Q. Is it accurately done? A. Yes, sir.

Q. Now, Mr. Collins, again for identification, handing you what has been admitted as Defendants

(Testimony of Edward Collins.)

Q, part two for identification, consisting of two sheets, will you merely identify that, please? Let's start with the sheet underneath first.

A. The sheet underneath is a summary of the square footage, full pieces, and the total pieces that were required in this project.

Q. Did you prepare sheet number two?

A. No; I did not prepare it.

Q. Did you check the figures on it?

A. Yes; I checked the figures.

Q. Have you made any pencilled notations on it?

A. Yes; I have.

Q. Now, turning to sheet one or the first sheet, the yellow sheet. What is that?

A. This is my recap in pencil of what I made the day before yesterday.

Q. And let me ask you whether or not the pencil notations on the white sheet are carried forth onto the yellow sheet recap? A. Yes, sir.

Mr. Olwell: May I show this to counsel, your Honor?

The Court: You may. [647-20]

Mr. Olwell: May I speak to counsel a moment, your Honor?

The Court: You may.

Mr. Arnell: May I inquire, your Honor?

The Court: You may.

Mr. Olwell: I will offer Defendants Q in evidence, your Honor, both parts.

The Court: Very well. Now you may inquire, Mr. Arnell.

(Testimony of Edward Collins.)

Q. (By Mr. Arnell): Mr. Collins, who prepared Defendants Exhibit Q-1, which are these (indicating) prints?

A. Fellow by the name of Gustafson.

Q. Who is he?

A. He's a fellow that works for Kuney-Johnson Company in Seattle.

Q. Is he still employed?

A. No; he's back at school now.

Q. When were these sheets prepared?

A. About three weeks ago.

Q. Did you personally assist in the preparation of these prints?

A. I was in the same room.

Q. Well, did you make the drawings?

A. No, sir.

Q. Did you check the drawings in each instance against the plans that were applicable to this job?

A. I did the day before yesterday, yes. [647-21]

Q. To what extent did you compare it?

A. I tried to find and have a record of the maximum number of full 4x8 sheets that could have been used on the project.

Q. Did you run another take-off based on the plans? A. Based on the plans, yes.

Q. Where is that take-off?

A. I either put a check mark beside his figure or I circled his figure and wrote in pencil to the right of the corrections that I made.

Q. Which figures did you accept that appear on Exhibit Q-2?

(Testimony of Edward Collins.)

A. The pencil figures. If there is no pencil correction, then the other figures are correct. If there is a correction in pencil, then the pencil figures are correct.

Q. Well, I note two columns here, Mr. Collins, where there are pencil check marks. A. Yes.

Q. Are those your marks? A. My marks.

Q. And what do those check marks indicate?

A. That I agree with his original.

The Court: That you originally agree with his figures?

A. That I agree with his figures, yes. [647-22]

Q. (By Mr. Arnell): At the bottom of those columns, Mr. Collins, I see pencil figures indicating different figures than those that appear on the print? A. Yes.

Q. And those pencil figures are yours?

A. Yes.

Q. And they represent your opinion as against his then as to what the figure should be?

A. Yes.

Mr. Arnell: If your Honor please, I would object to Defendants Exhibit Q-1 because they are prints that were made, as the witness testified, three weeks ago. There is no showing that they are identical with the plans which are an exhibit here and under which this contract had to be performed.

Mr. Orwell: May it please the court, does your Honor wish to hear from me?

The Court: Well, I was just going to inquire of

(Testimony of Edward Collins.)

that very fact of this witness. You may do so, if you wish.

Mr. Olwell: Either way.

The Court: You may proceed.

Q. (By Mr. Olwell): Mr. Collins, I think you stated in answer to Mr. Arnell's question that you prepared these plans? A. I am sorry.

Q. I think you stated in answer—you compared this with the [647-23] plans? A. Yes.

Q. By which—what do you mean by the plans?

A. The contract drawings.

Q. On what job? A. 384.

Q. And is it accurate in respect to the plans, contract drawing? A. Yes, sir.

Mr. Olwell: Now, if the court please, I have and the witness brought up with him from Seattle a duplicate copy of the plans. They are already in evidence here. I think it would burden the court to put them in evidence. I renew my offer. I think it's properly identified.

The Court: Mr. Collins, can you account for the difference between your figures and that of Mr. Gustafson?

A. Yes. On the first sheet or—no, beg your pardon. That was on the 12th sheet—in the kitchens. When he was doing this and laying it out and doing the drawing he asked Mr. Johnson of Kuney-Johnson Company, whether it could use full sheets in there and Mr. Johnson said he didn't think so. Consequently, he did not use or utilize the full sheet, but I took it that there could have been full

(Testimony of Edward Collins.)

sheets used in the kitchens, I think there are three of them, so I drew in the full sheets and corrected those and made more full sheets. [647-24]

The Court: Is that substantially the difference between your figures and that of Mr. Gustafson?

A. I think there was one or two other occasions where the number of pieces, not full sheets, but number of pieces were changed. We could have used —instead of having two pieces we could have used one piece, not a full sheet.

The Court: I see.

Mr. Arnell: Well, if your Honor please, I find nothing on any of these sheets to refer to Contract 384. I find no scale other than reference that the scale is one-quarter inch equals one foot, but there are no measurements and there is only one room diagrammed and the rest of these drawings, I presume, are measurements of standard sheets of sheet-rock.

The Court: Counsel, you could compare those with the original plans, as Mr. Orwell pointed out, to see whether or not they are in conformance. Now, you have a scale, you say a quarter inch to one foot. That is a common scale, very common scale.

Mr. Arnell: Well, if your Honor please, that would take at least an hour and I certainly am not qualified to compare these with any of the official plans and I think if the witness is to refer in his testimony to any documents he should refer to the official exhibits and official documents under which this contract was to be performed, and, as I point

(Testimony of Edward Collins.)

out again, your Honor, there is no identity between this proposed Exhibit Q-1 and 384.

The Court: Well, I point out to counsel that this [647-25] witness has testified that these were taken from the plans now in evidence.

Mr. Arnell: That is true, your Honor, but he stated also that he did not draw these prints or diagrams or anything else. Someone else did it and I think that, again, your Honor, that that makes it inadmissible.

The Court: But he did do this: He stated that the day before yesterday he checked it with the plans and did find that they were the same, more or less, schematic or lay-out plans as set forth in the original plans now in evidence. Is that not true?

A. Yes.

The Court: For the reason that it's illustrative of the evidence and the position of the defendants case, the objection will be overruled. They may be admitted and marked Defendants Exhibit Q.

Q. (By Mr. Olwell): During the late spring and summer of 1953 did you have occasion to observe the application of the sheetrock at Ladd?

A. Yes.

Q. State just what your normal day up there would have been? In other words, were you on the job or off the job or where were you?

A. I was on the job most of the time in the office.

(Testimony of Edward Collins.)

Q. And on many occasions were you out on the project? [647-26] A. Yes, sir.

Q. Infrequently or frequently?

A. Frequently.

Q. Now, do you consider yourself as an expert qualified to pass on sheetrock application?

A. No.

Q. Did you observe the taping? A. Yes.

Q. How did the taping look to you from observing it at 384?

Mr. Arnell: If your Honor please, I object to that question upon the ground it calls for a conclusion of the witness. Counsel can ask him what he observed or what he saw, as far as the taping is concerned.

Mr. Olwell: If your Honor please, the question was poorly phrased and I apologize.

Q. (By Mr. Olwell): Just tell me what you saw?

The Court: The court need not rule.

Q. Just tell me what you saw of the taping?

A. The taping was not too good in my opinion. It had——

Mr. Olwell: Just hold up, Mr. Collins, please.

Mr. Arnell: If your Honor please, I move the answer be stricken upon the ground the witness stated a conclusion and opinion.

The Court: Motion is granted. [647-27]

Q. (By Mr. Olwell): Just tell us what you saw.

A. I saw seams. I saw tape that was not cov-

(Testimony of Edward Collins.)

ered. I saw ridges. I saw places where there may have been too much tape, places where there may have not been enough—spackle, I beg your pardon.

Mr. Arnell: I move that that answer be stricken upon the ground he stated an opinion, too much tape and too much spackle, not enough.

The Court: The latter part of the question may be stricken where he refers to too much or too little. He has testified he is not qualified or an expert in the field of taping or spackling.

Mr. Olwell: Your Honor, he has not as yet, but I intend to have him so testify. Is it not true, Mr. Collins, you are not qualified?

A. No, sir.

The Court: But he testified to a question you asked him a little while ago, are you an expert?

Mr. Olwell: That was on sheetrock.

The Court: I beg your pardon.

Mr. Olwell: I am in this position. I am identifying the witness as not an expert.

The Court: Yes; I thought the records showed it. [647-28]

Q. (By Mr. Olwell): During the course of the summer of '53 and the fall of '53, Mr. Collins, did you have any occasion to observe the painting that went on? A. Yes.

Q. What did you observe? What did you see regarding paint?

A. I saw the paint applied to the walls. I saw it applied to the ceilings. I saw on the woodwork there were runs, on the walls there were holidays.

(Testimony of Edward Collins.)

Q. Did you ever discuss the paint or any matter relating to paint with Mr. Soby?

A. I don't understand the question.

Q. Did you ever discuss the painting with Mr. Soby?

A. I probably discussed it with him, yes.

Q. Did you ever have occasion to be present at an inspection concerning painting? A. Yes.

The Court: Counsel, could we take a recess for a few moments? We have been in session since 1:30 solid. The court will stand in recess for a period of 10 minutes.

(Whereupon, at 3:20 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had.)

Q. (By Mr. Olwell): Mr. Collins, do you recall a specific date of the inspection to which you referred just prior to the recess concerning [647-29] painting when Mr. Soby was present?

A. October 22, 1953.

Q. 1953? A. Yes.

Q. Now, prior to that time, in the late summer and fall of '53, had you ever discussed the painting or the painting problems with Mr. Soby?

A. Yes.

Q. Just tell in your own words what the discussion was with him?

A. Well, we didn't feel that the——

Mr. Arnell: If your Honor please, before the

(Testimony of Edward Collins.)

witness testifies, may he specify the dates and places?

The Court: Yes. Objection sustained.

Q. (By Mr. Olwell): If you can, Mr. Collins, let's pin this down as much as we can to dates and places and who was present. If you are unable to state the exact date, state the approximate time to the best of your ability.

A. I don't know the exact date. It was prior to October 22, and Mr. Soby and Harold Stenson, our general superintendent, and Eugene Henrikson, our job superintendent, and myself, talked with Mr. Soby about his work.

Q. And what did he say?

A. He said that he had seen work in Anchorage that was—excuse me—at Fairbanks was as good as the work he had seen at [647-30] Anchorage and also they were building some 8-family quarters at Eielson Air Force Base and he said the work down there was no better than his work at Ladd Air Force Base.

Q. What, if anything, did you or Mr. Soby do?

A. We went down to Eielson Air Force Base and looked over another contractor's project.

Q. Who was along, do you remember?

A. Mr. Soby, Mr. Stenson, I think Mr. Henrikson, and myself.

Q. And what was said down there between you people and Mr. Soby?

A. We didn't think that the quality of work on our contract at Ladd was as good as the one at

(Testimony of Edward Collins.)

Eielson, however, Mr. Soby said he was assured that his work would pass and requested that we get an inspection.

Q. Excuse me. Go ahead.

A. That we would—he asked for an inspection and he was sure that the inspector would pass his work.

Mr. Arnell: If your Honor please, now I'd like to move that the answer be stricken upon the ground that it's not responsive to the question asked.

Mr. Olwell: May it please the court, I think it's directly responsive.

The Court: As I recall it, Mr. Arnell, he is testifying as to what was said in the presence of Mr. Soby, therefore, objection will have to be [647-31] overruled.

Q. (By Mr. Olwell): Was it thereafter that this inspection of October 22 took place? A. Yes.

Q. Now, what happened at that inspection, Mr. Collins?

A. The Corps—two representatives of the Corps of Engineers were there, Mr. Soby, I think Mr. Carlson, Mr. Soby's superintendent; Mr. Stenson, Mr. Henrikson, and myself from the Kuney-Johnson Company were there.

Q. And tell us what happened there?

A. The Captain or the Major—Conlin is his name—of the Corps of Engineers told us and told Mr. Soby that this particular building that he was looking at was not to the satisfaction of the Corps

(Testimony of Edward Collins.)

of Engineers and there'd have to be work done on it to make it satisfactory.

Q. And was anything agreed upon at that time?

A. It was agreed at that time that we would personally try to supervise the work to see that we could get a building acceptable by the Corps of Engineers.

Q. Was any plan discussed at that time with Mr. Soby and Mr. Carlson concerning the manner in which the work would proceed?

A. Yes. I believe, after the members of the Corps of Engineers left, Mr. Soby, and Mr. Carlson and Mr. Stenson and Henrikson and myself tried to lay out a pattern that we should follow and it was agreed that we would concentrate on one building [647-32] at a time, in the first apartment, say, try to whip that out so that it would be satisfactory to the Corps and then move to the next one and so on down the line, so we would definitely have the work done to their satisfaction; not that we would put in 20 or 30 painters in one building, but we would try to improve on what was done.

Q. Was that plan followed out?

A. It was for a few hours of the following day, I believe.

Q. And what happened after that, of which you have personal knowledge, Mr. Collins, not what someone told you?

A. The job superintendent, Henrikson, came into the office along with Mr. Carlson and said that he

(Testimony of Edward Collins.)

wanted Carlson removed because the plan that we had decided upon yesterday was not being fulfilled.

Q. Did he explain that?

A. He said that at the beginning of the day—whether it's 8:00 o'clock in the morning, I don't remember—Mr. Carlson started to put the painters in to do the repair work, so to speak, and around 11:00 o'clock or prior to noon he went to check on them again and they were scattered in various locations.

Q. What, if anything, did Mr. Carlson say?

A. He didn't say anything.

Q. And what took place after Mr. Henrikson's explanation?

A. Mr. Stenson, the general superintendent, was consulted and a [647-33] letter was written to Mr. Soby in regards to the removing of Mr. Carlson.

Mr. Olwell: May I approach your clerk, your Honor?

The Court: You may.

Mr. Olwell: May I have Plaintiff's Exhibit 39? May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Olwell): Handing you what has been admitted in evidence as Plaintiff's Exhibit 39, I will ask you if that is the letter to which you refer?

A. Yes; it is.

Q. And who signed that letter? A. I did.

Q. Did you ever receive a reply to it?

A. No, sir.

(Testimony of Edward Collins.)

Q. Did you ever discuss that letter after it was written with either Mr. Carlson or Mr. Soby?

A. No, sir.

Q. Did you ever have occasion during the course of the fall of 1953 to have any personal conversation with Mr. Carlson prior to October 23 concerning the painting supervision or any problems of his?

A. Yes; I did. I don't recall the date.

Q. Do you recall where it was that this conversation took place? [647-34]

A. It was on 384 Contract between the buildings.

Q. And just who was present?

A. Just Mr. Carlson and myself.

Q. And just what took place, what was said?

A. Mr. Carlson was very unhappy about the whole situation and he said he can't have the painters do this and can't make the painters do that and he was very unhappy and I just, well, patted him on the back and that was about all.

Q. Now, Mr. Collins, on the job at 384 what, if anything, did you have to do with making any payments to Mr. Soby?

A. Mr. Soby would bring in his payment request and I would okay it and give it to the office manager.

Q. And do you recall whether there was any—strike that, please. I will start over. In what form were those payment requests?

A. I imagine they were in the form of a letter. I don't remember.

Q. Well, my question was whether or not it was

(Testimony of Edward Collins.)

a request for progress payment? A. Yes.

Q. Was that arrangement ever changed, that is, a progress payment?

A. Yes; it was. At one time, I believe, I authorized the payment to Mr. Soby not on a progress payment.

Q. Can you state whether or not at any time during the job you issued checks to cover his payroll?

A. I did not issue the checks. They [647-35] were issued.

Q. Did you authorize that?

A. No; I did not authorize payroll to meet his payrolls.

Q. Do you know who did?

A. I think it was a representative of the bonding company.

Q. Well, what I mean, as far as the issuance of the check itself by Kuney-Johnson, did you authorize that issuance of the actual drawing of the check?

A. I did.

Q. Yes? A. No; I did not.

Q. Who in behalf of Kuney-Johnson did?

A. Mr. Barkley.

Q. Now, there has been some conversation here in your testimony, Mr. Collins, concerning the progress estimates that Kuney-Johnson put into the Government. Can you just state in your own words how that was handled, 384?

A. We did not put in progress estimates on 384

(Testimony of Edward Collins.)

to the Government. The Government made them out themselves.

Mr. Olwell: May I have an exhibit, your Honor?

The Court: You may.

Mr. Olwell: I can get it faster than I can ask the clerk.

The Court: Very well.

Mr. Olwell: If your Honor please, this is one of the exhibits to which I was referring that has come apart.

The Court: What I'd suggest—— [647-36]

Mr. Olwell: I don't know whether it can be stapled. You can see how it's fastened.

The Court: I'd suggest that you staple it. The Clerk of the Court has a large stapling machine.

Mr. Olwell: My only fear is one of these times it's going to get dropped and then we might be in trouble. Does your Honor wish me to staple them now or——

The Court: No. Will you get the staple machine, Mr. Johnson?

Mr. Olwell: May I approach the witness?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you Plaintiff's Exhibit 37, which appears to have a number after it, 58, probably marked page 58. You say the Government made out something itself. Can you refer to that exhibit and clarify that statement as to which part of it you mean?

A. We didn't make it out. We didn't make out any portion of it.

(Testimony of Edward Collins.)

Q. Now, turning to the larger sheets which are on the bottom and which contain breakdowns as to the portion of the project involved. Calling your attention to building closure, interior finish, plumbing fixtures, heating, electrical, and so forth, by apartment numbers.

A. Uh-huh.

Q. What is included in the term "interior finish"? [647-37]

Mr. Arnell: If your Honor please, I object to that upon the ground it calls for a conclusion of the witness.

Mr. Olwell: I will ask a preliminary question, Your Honor. I will withdraw that.

Q. (By Mr. Olwell): Mr. Collins, do you know what is included in that term "interior finish"?

A. Yes.

Q. Will you state, please, what is so included?

A. Interior finish on this particular project would be—it would mean the hardwood floors, the door frames, the doors, the millwork, trim, kitchen cabinets, floors and wall covering, and painting, finish hardware, and possibly bathroom accessories, but I am not too sure.

Q. Mr. Collins, do you know what per cent of the total project was involved in the interior finish, percentage-wise?

A. It's shown—

Mr. Arnell: I object to that upon the ground it calls for a conclusion of the witness. No foundation has been laid to qualify him as an expert.

Mr. Olwell: I will withdraw the question in the interest of time.

(Testimony of Edward Collins.)

Q. (By Mr. Olwell): Mr. Collins, referring to the exhibit that you have in front of you, I believe it's Exhibit 37. Is the percentage of [647-38] interior finish as against the entire project shown on that exhibit? A. Yes, sir.

Q. What is that percentage?

A. 20 point 25.

Q. And have you had occasion to compute dollarwise the amount of money involved in interior finish? A. Yes.

Q. Approximately what is that figure?

A. Four hundred and thirty-six thousand some odd dollars.

Q. Now, Mr. Collins, at any time during the progress of the painting work, let's say from very early in July, 1953, until December 19, 1953, did Mr. Soby ever complain to you personally about popped nails? A. No.

Q. Did he ever complain to you about any sag in the ceilings or sheetrock? A. No.

Q. Did Mr. Soby ever discuss with you personally any extras to which he thought he was entitled?

A. Yes.

Q. In what respect? Just tell us what extras he discussed.

A. The extras that he discussed was for additional spackle work around metal door frames, repairing the ceiling of buildings one, two and three, I believe, extra spackle on that and the [647-39] painting, the extra spackle work around the elec-

(Testimony of Edward Collins.)

trical outlet boxes. I think we moved a door that had already been in place and he was—that was an extra. In the bathrooms the escutcheon plate for the sink drain would not cover the hole that was made in the plasterboard and he had to have extra spackle for that.

Mr. Olwell: May I approach the witness, Your Honor?

The Court: You may.

Q. Mr. Collins, handing you what has been admitted in evidence as Defendant's Exhibit K. What is that, please?

A. Statement of extra work done for Kuney-Johnson Company.

Q. Was that handed to you by Mr. Soby?

A. Yes.

Q. Does that cover the matters that you just testified to that he discussed with you that he claimed for extras?

A. There is a couple of other items here, too, that I didn't remember.

Q. Now, let me ask you this: Did Mr. Soby ever present any other claim to you other than as shown on Exhibit K? A. No.

Q. And when he brought that letter in to you what, if anything, took place?

A. When Mr. Soby brought this in to me his figure was for \$4,480.00 under the title "Labor and Material, Contract 384," in his invoice, and we arrived at an hourly rate for the [647-40] various

(Testimony of Edward Collins.)

items that he listed in here. We discussed it and some of it was due to spackling. The price that the spackler had, Mr. Soby said was too high, and together, possibly with Mr. Henrikson, we arrived at the price in ink in this letter.

Mr. Olwell: If your honor please, your clerk stepped out. May I see if I can find Exhibit F?

The Court: Yes, you may do so.

Mr. Olwell: May I approach the witness, Your Honor?

The Court: You may.

Q. (By Mr. Olwell): Mr. Collins, handing you subdivision A of Defendant's Exhibit F, and calling your attention to the second sheet, do the figures as shown on that sheet have any relation to the total figure, \$3,536.00 odd dollars as shown on Exhibit K?

A. Yes, sir.

Q. What relationship do they have?

A. The figure \$3,536.00 is the same as the \$3,536.00 on this Exhibit K.

Q. And what is shown on subdivision A of Exhibit F?

A. It is a breakdown of the various extra work that Mr. Soby performed under this contract.

Q. You mean under the claim of Exhibit K?

A. Yes.

Q. Mr. Collins, will you look at the bottom of Exhibit K. There [647-41] is an additional item added there. A. Yes.

Q. Will you tell the court what took place concerning that?

(Testimony of Edward Collins.)

A. At the time that Mr. Soby presented his bill, he had also painted the clothesline poles in the basement of these apartments and we just added it to this bill.

Q. Turn that over, please, to the back side. Whose writing appears there?

A. That is my writing.

Q. And what does that relate to?

A. Mr. Soby did extra work for the plumber. He painted the piping in the basement for the plumber and also he painted some of the piping in the utilidors for the plumber, Urban Plumbing and Heating Company. Also Mr. Soby painted the convectors in each of the apartments and when the plumbers came in to make their final test, would kick them or damage them and so Mr. Soby had to go back and paint those again. Then we used the structural steel beam in the basement to hold up the first floor joists and we—there was an option to the contract, we used it. It was not included in Mr. Soby's price, and I have a figure here of \$904.40 for that painting. Also we used pre-finished kitchen cabinets on that job and these were finished in the states and sent up but they received damage and Mr. Soby, we asked him to do that work and I have a price of \$1,092.00, approximately. Now, whether [647-42] it was an estimate, I don't know.

Q. Do you recall whether or not that general subject, as shown on the back of Exhibit K, was discussed with Mr. Soby at the time he brought in the letter which is now Exhibit K?

(Testimony of Edward Collins.)

A. I don't know if it was or not. I really don't know.

Q. And it relates, I think you said, all to the Urban Plumbing and Heating matter?

A. No. The first item up here is for Urban, but the other ones are for work that he would do for us.

Q. I see. Now, Mr. Collins, do you recall the occasion when Mr. Douglas, Consulting Engineer for the U.S.F. & G., came to Ladd and looked over the Ladd project? A. Yes.

Q. Do you remember approximately when it was?

A. I think it was some time in December, but I don't know for sure.

Q. Did you have occasion at that time to go around the project with Mr. Douglas?

A. Yes.

Q. What did the two of you do?

A. There was Mr. Henrikson and Mr. Stenson and Mr. Douglas and myself. We were not alone.

Q. What did you do, Mr. Collins?

A. We went and looked at several apartments in the project.

Q. And what, if anything, did Mr. Douglas say to you? [647-43]

Mr. Arnell: I object to that upon the ground it's beyond the issues of the pleadings. There is no allegation here that Mr. Douglas had any authority or any right to bind the bonding company. This is an action that is based entirely on the provisions of the Miller Act. I, therefore, think that the question

(Testimony of Edward Collins.)

and the answer is incompetent, irrelevant and immaterial.

The Court: Well, but, counsel, didn't Mr. Douglas testify that he was instructed by the principal, United States Guaranty, to come up and make an inspection of this building?

Mr. Arnell: That is no proof, Your Honor, that he had any authority. He made two visits.

Mr. Olwell: If the court please, my memory could be mistaken as to exact dates, but my recollection is that at the pretrial conference in this case on the 21st of September, and I believe it was incorporated in the pretrial order, but, in any event, at the pretrial conference, counsel and I stipulated that Mr. Murray and Mr. Douglas had authority to act for the additional defendants.

Mr. Arnell: No, that is not so stipulated, Your Honor, and I ask the court to examine the pretrial order to verify the statement.

Mr. Olwell: I do not recall definitely whether it's contained in the order, but I distinctly recall the question because the question came up regarding correspondence and the only stipulation the defendants made, they objected to a man by the name of Beeson [647-44] at the time, but did agree Mr. Douglas and Mr. Murray had authority.

Mr. Arnell: We made no such stipulation.

The Court: I don't recall that, Mr. Olwell.

Mr. Olwell: I beg your pardon?

The Court: I don't recall that. They agreed

(Testimony of Edward Collins.)

quite the contrary. I think they took the position that Mr. Douglas could not, but then that is——

Mr. Olwell: I think that is immaterial, but that was my recollection of that aspect and Mr. Douglas testified in this case as to what he saw and described it. Now, certainly, I am entitled from this witness to tell how Mr. Douglas described the situation as he then saw it to Mr. Collins.

The Court: I think that Mr. Olwell is right. Mr. Arnell, therefore, objection will have to be overruled.

Q. (By Mr. Olwell): What did Mr. Douglas say about the situation that you and he and Mr. Stenson, Mr. Henrikson observed on this occasion to which you refer?

Mr. Arnell: If your honor please, I object to the question unless the witness testifies that Mr. Soby was there. Now, we have two facets to this problem: One is U.S.F. & G. and the other is the plaintiff in this action, and the answer might be admissible as against one, but not the other.

The Court: Well, but, counsel—— [647-45]

Mr. Olwell: May it please the court, Mr. Douglas was put on as a witness in Plaintiff's case.

Mr. Arnell: That is quite true, Your Honor, but his testimony did not go to the field that this witness is asked to testify about. Mr. Douglas testified what he saw and what he observed at the jobsite and the condition of the walls and the wallboard, etc.

The Court: Well, objection will have to be over-

(Testimony of Edward Collins.)

ruled because Plaintiff called Mr. Douglas as part of his case.

Q. (By Mr. Olwell): Do you remember the question, Mr. Collins? A. Yes.

Q. Answer it, please.

A. Mr. Douglas told us that it was a very poor job and he didn't doubt that the Government would reject the buildings that we had asked for inspection.

Q. And thereafter what did Mr. Douglas do?

A. Mr. Douglas was in Fairbanks, I believe, for two or three days and he came into the office and talked to Mr. Barkley.

Q. Were you present?

A. Some of the time, yes, I was.

Q. Did you hear any portion of the conversation? A. Yes.

Q. What did you hear of the conversation?

Mr. Arnell: If your honor please, on behalf of the [647-46] Plaintiff, at least, I would object again and renew my objection to this testimony unless it is shown that the Plaintiff was present.

The Court: Well, for the record who was present, Mr. Collins?

A. Mr. Barkley, Mr. Stenson, possibly Mr. Henrikson, and myself.

The Court: Objection is overruled. He may answer.

Q. (By Mr. Olwell): What did you hear, Mr. Collins, of the conversation?

(Testimony of Edward Collins.)

A. Mr. Douglas told Mr. Barkley that they would pay the payroll to do the work and——

Mr. Arnell: If your honor please, may the record show a continuing objection?

The Court: It may.

Q. (By Mr. Olwell): Now, Mr. Collins, I think you said that you were not present during all of the time the Larson Brothers worked on the job?

A. No, I was not.

Q. There has been testimony in this case, Mr. Collins, that in late August and/or early September of 1953 there was a general conference or discussion concerning the sheetrock and nails at which you and Mr. Stenson, Mr. Bottoroff, some others, Mr. Carlson probably, were present, and in which Mr. Stenson is alleged to have made statements concerning payments for extra work to be done by Soby Painting Company. Mr. Collins, [647-47] at any time in your presence did Mr. Stenson ever promise Mr. Carlson, Mr. Soby, or any representative of the Soby Painting Company or its subcontractor, Bottoroff, that extra work would be paid for?

Mr. Arnell: If your honor please, I'd interpose an objection upon the ground, first, the question is leading, and, second, there has been no foundation laid for it.

The Court: Objection sustained. You may testify as to what was said.

Q. (By Mr. Olwell): Do you recall any such conversation concerning extras?

(Testimony of Edward Collins.)

Mr. Arnell: I renew my objection, Your Honor, upon the ground that there has been no foundation laid.

Mr. Olwell: May it please the court——

Mr. Arnell: And this question that has been asked, Your Honor, is based upon the leading references in the prior question to assist this witness to arrive at an answer and I object to it upon that ground.

Mr. Olwell: May it please the court, I'd like to be heard on that.

The Court: Just a moment. There was testimony during the course of the trial that Mr. Stenson is supposed to have promised the Plaintiff, Mr. Soby, that he would see that he was paid for the extras. Now, this is part of the Defendant's case at the present time and they have, of course, certainly the right [647-48] to put on any proof that they might have as to conversations concerning that subject.

Mr. Arnell: Well, if your honor please, I certainly would confess that, however, I think that in an effort to do that counsel has not—does not have the right to ask leading questions.

The Court: Well, that, I concur. That is why I sustained your former objection and counsel, of course, has the right now to refer to any conversation that was had between Mr. Stenson and Mr. Soby concerning this subject.

Mr. Olwell: May it please the court, this thing comes up entirely as a matter of refuting and an-

(Testimony of Edward Collins.)

swering prior testimony. Now it strikes me that it's entirely proper to state to a witness the testimony was thus and so, you were alleged to be present. Did you hear that conversation. Now, to ask the witness what took place, the witness might state that he wasn't even present and he doesn't even remember such a conversation. I think I am entitled to ask him, was this statement made in your presence.

The Court: No, the court doesn't take that position, counsel. You may ask him what the conversation was and then if the witness does not remember and you know that conversation did center around a particular subject, then you may ask a suggestive question on the particular subject you allude to, but you mustn't put words in the mouth of the witness as to what was said until such time as it has been determined that he doesn't know what you are getting at. There is nothing gained by the ruling of the [647-49] court on the admissibility of evidence, but we are endeavoring to get voluntary and free statements of the witness so the court will have the most probative evidence possible to determine the issues in this case.

Mr. Olwell: I appreciate that.

The Court: And by your suggesting the answer, then that is not free and voluntary.

Mr. Olwell: I appreciate that. I had not intended to argue. I did not intend to suggest the answer. I merely intended to ask the witness if this was said. He can say yes, he can say no. That

(Testimony of Edward Collins.)

does not suggest an answer. He could say, yes, it was said, or he could say no, it's not.

The Court: I think the court has ruled that the objection should be sustained because it is leading and I have also suggested to you how you may conduct yourself thereafter, if by chance the witness does not recall the conversation that was had.

Now, may I interrupt you, please, since we are interrupted now on this problem. We have the matter of continuing at 4:00 o'clock. I would like to take a recess for a few moments now and excuse counsel. Counsel, I'd like to go into this other problem we have pending before us, so the trial of this case will be continued until the call of the gavel and the court will go into recess for a period of five minutes.

(Thereupon, at 4:15 o'clock p.m., following a [647-50] five-minute recess, court reconvened, and after hearing a matter not pertaining to this case, the following proceedings were had:)

The Court: You may proceed then.

Q. (By Mr. Olwell): Mr. Collins, do you recall any discussion, meeting, or conference in the latter part of August or the first part of September, 1953, at which Mr. Bottoroff, Mr. Carlson, Mr. Stenson, Mr. Soby were present when any matters were discussed relative the sheetrock or anything else?

Mr. Arnell: If your honor please, I would object to that again upon the ground that it's a leading question.

(Testimony of Edward Collins.)

The Court: Objection overruled. He may answer.

Q. (By Mr. Olwell): Do you recall any such conference, discussion or meeting?

A. No, I am sorry, I don't recall.

Q. Do you recall any specific conference or meeting in June of 1953, referring particularly to the latter part, concerning sheetrock when Mr. Stenson and Mr. Henrikson, you and Mr. Bottoroff and Mr. Carlson were present? Do you recall any specific conference, meeting on that subject?

A. No.

Q. Do you recall discussing with Mr. Soby the number of tapers to be sent to the Ladd job, which discussion could have taken place shortly before the taping started on the job? [647-51]

A. Tapers?

Q. Yes. A. No.

Q. Will you state whether or not at any time you directed Mr. Soby or requested him to bring any specific number of tapers to the job?

A. No, sir.

Mr. Olwell: You may examine. I tender the witness for cross-examination.

The Court: Very well.

EDWARD COLLINS

testifies as follows on

Cross-Examination

By Mr. Arnell:

* * *

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of
the above-entitled Court, hereby certify:

That the foregoing pages 647-1 through 647-53
is a true and correct transcript of excerpt of pro-
ceedings on the trial of the above-entitled action,
taken by me in stenograph in open court at Anchor-
age, Alaska, on October 11, 1956, and thereafter
transcribed by me.

/s/ BONNIE T. BRICK.

EDWARD COLLINS

testifies as follows on:

Redirect Examination

Mr. Olwell: Your Honor, may I approach the
witness and hand him an exhibit, please?

The Court: You may.

By Mr. Olwell:

Q. Mr. Collins, counsel inquired of you as to the
amount of hours necessary on the ceiling work by
reason of the insulation having to be replaced in
Buildings 1 and 2, a portion of which was shown
in Exhibit K. Now, I have handed you Plaintiff's
Exhibit 33, subdivision 1, and call your attention to
the itemization of the total amount of \$3,556.00
shown on Exhibit K. Will you look at the first item

(Testimony of Edward Collins.)

on that sheet and just state for the record the number of hours involved in these totals after that rework was done?

Mr. Arnell: I object to that upon the ground it is repetitive. The document speaks for itself. As I recall his answer on cross, he did not know, and I was testing only his recollection. The document is in evidence and that is the best evidence, Your Honor.

The Court: Mr. Olwell, doesn't the exhibit speak for itself?

Mr. Olwell: If your honor please, I concede the [695-1] exhibit speaks for itself, but counsel inquired at some length the number of hours and this is one item contained in that and for the record I just wanted him to state the number of hours. I won't pursue it any further.

The Court: That being the case, you may state the number of hours.

A. One hundred and sixty-four hours.

Mr. Olwell: I have no further questions of this witness, your honor.

The Court: Very well.

Mr. Arnell: I haven't any either.

The Court: Very well. You may step down.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing pages 695-1 and 695-2 is a true and correct transcript of excerpt of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on October 15, 1956, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed February 19, 1959.

[Endorsed]: No. 15823. United States Court of Appeals for the Ninth Circuit. Eric Soby, Doing Business as Soby Painting Co., et al., Appellants, vs. Lloyd W. Johnson and Max J. Kuney, etc., Appellee. Supplemental Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: March 2, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,823

United States Court of Appeals
For the Ninth Circuit

ERIC SOBY, d/b/a Soby Painting Co., and
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY,
d/b/a Kuney Johnson Company,

Appellees.

Appeal from the District Court for the
District of Alaska, Third Division

BRIEF OF APPELLANTS

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FILED

MAY 14 1959

PAUL P. O'BRIEN, CLERK

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2. Upon the facts in this case it was improper for the District Court to award interest upon the total amount of the judgment to appellees (defendants and cross-complainants below) from and after September 1, 1956, a date 7 months and 11 days prior to the date of such judgment because the amount of such damages prior to such judgment was wholly unliquidated and unascertained	30
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No. 15,823

United States Court of Appeals For the Ninth Circuit

ERIC SOBY, d/b/a Soby Painting Co., and
UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

Appellants,

VS.

LLOYD W. JOHNSON and MAX J. KUNEY,
d/b/a Kuney Johnson Company,

Appellees.

Appeal from the District Court for the
District of Alaska, Third Division

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this case by virtue of the provisions of 40 U.S.C. 270 *et seq.* (49 Stat. 794), the so-called "Miller Act". On May 2, 1957, this Court acquired, and therefore now has, jurisdiction pursuant to 28 U.S.C. 1291, which then provided¹

¹Public Law 85-508, approved July 7, 1958, effective upon the admission of Alaska into the Union, eliminated the provisions which gave this Court jurisdiction of appeals from the District Court for the Territory of Alaska and established a United States District Court for the State of Alaska. Nothing in that Act, of course, expresses any legislative intent to deprive this Court of

that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 USC 1294 which designates this Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE

The Pleadings²

Appellant Soby filed his Amended Complaint on the 26th day of September, 1956, alleging that appellees were prime contractors under contract with the United States to construct a housing project at Ladd Air Force Base at Fairbanks, Alaska. A portion of the construction work involved the application of sheet-rock to the walls and ceilings of the housing units and upon application of such sheets to the walls and ceilings there was required to be applied—to make the surfaces of the walls and ceilings suitable for painting—a process known as taping and spackling which involved applying tape and a plaster solution to the edges of the sheets and between the sheets and the woodwork, to obtain a smooth surface. This advance preparation, together with the painting process of the interior of

jurisdiction over cases acquired prior to the effective date of such change or, for that matter, to deny retroactively to litigants from Alaska, the right of appeal. The Miller Act, obviously, covers subject matter directly within the cognizance and competence of a United States District Court (See: 28 U.S.C. 1331).

²Transcript of Record (T.R.), at pp. 3-50.

the units, was subcontracted by the prime contractor to the appellant Soby who was a painter. The taping and spackling, being a construction specialty, not coming under the work jurisdiction of painters, was in turn subcontracted to a third party by appellant.

Appellant Soby complained that the appellees used inferior and damaged sheetrock, containing excessive moisture, in surfacing the walls and ceilings; that such inferior and damaged sheetrock made the cost of taping and spackling substantially more than the amount for which the appellant Soby had agreed to do the work; and that when the painting of the interiors was commenced and partially completed, the appellees introduced a high degree of heat into the units causing shrinkage in the materials to occur by evaporation of the excessive moisture, destroying the painted surfaces, causing the sheetrock to buckle, the nails to pop and cracks to appear. The destruction of the painted surfaces by such shrinkage made it necessary for appellant to return to units already completed and repaint the interiors, many of them as much as four times each, all to the effect that before some of the units were even partially painted, appellant Soby had performed repainting to such an extent that his costs were far in excess of any profit he might realize from the performance of his contract, and that the additional costs of performing the remainder of the work, plus the constant repainting resulting from shrinkage, could not be reimbursed within the terms of his contract. Appellant Soby, who was operating on a close margin, was forced into insolvency, and was unable to finish much

of the work included in his contract. Appellant Soby alleged further that by reason of the excessive costs he had been put to by the improper work of the prime contractor, he was compelled to temporarily discontinue performance of the contract. He sought to recover against appellees for his additional expenditures and for his loss of profits, the sum of \$133,662.39. Appellees answered and denied the allegations of faulty workmanship; denied the use of materials containing excessive moisture; and also denied that the work subcontracted for by appellant could have been completed at a profit.

Appellees, having answered the complaint, cross-claimed against appellant Soby, alleging that on or about December 19, 1953, he breached his contract and voluntarily removed all of his workmen from the project and ceased the performance thereof; and never, at any other time, returned to continue the performance of the contract. They further alleged, that by reason of appellees' contractual responsibility to the United States to finish the project, appellees were obligated to complete the unfinished work and did so to the satisfaction of the United States, advancing for such performance their own funds in the sum of \$81,009.85, for which they sought reimbursement.

A second cross-claim filed by appellees alleged that in addition to the prime contract work undertaken by appellees at Ladd Air Force Base, Fairbanks, Alaska, under which appellant Soby had a subcontract for taping, spackling and painting, the appellees had entered into a second prime contract with the United

States for the performance of work in connection with airmen's dormitories and a mess hall at Eielson Air Force Base, Alaska, and that the taping, spackling and painting portions of said contract were subcontracted to appellant Soby who, having entered upon the performance of such work, failed to complete the same and on or about December 19, 1953, removed all workmen from the project and ceased doing any work in connection therewith; and thereafter failed to perform the work necessary to complete said project; that the appellees were required to enter into the project and complete the unfinished work; and that the cost of completing the unfinished work was in the sum of \$53,955.43 which further sum appellees claimed as reimbursement from appellant. It is with the issues raised by this claim and the judgment thereon, that this appeal is primarily concerned.

The Evidence

In the analysis of the evidence adduced at the trial in the court below, appellants herein will limit themselves to the facts pertinent to the issues raised in the specification of errors on this appeal. Specifically, the evidence set forth in greater detail below concerns itself with the issues of law and fact raised by appellees'³ second cross-complaint, pertaining to alleged damages arising from a claimed breach on the part of appellant⁴ Soby when he assertedly breached a contract for the performance of work and labor, and the

³defendants below

⁴plaintiff below

furnishing of materials, as a painting subcontractor, on a general government building contract held by appellees with respect to military installations at Eielson Air Force Base, near Fairbanks, Alaska.⁵

As has been shown in the discussion of the pleadings, above, appellees in their second cross-complaint alleged that they had been thus damaged in the sum of \$53,955.43 and in proof thereof evidence was introduced on behalf of the appellees, to the effect that they had expended this sum in payment of claims submitted to them by another painting subcontractor, one Harold Larsen. Larsen had been substituted for the appellant Soby when the latter terminated (or as appellees contended below, abandoned) his services under the contract, which he claimed were made impossible of performance by failure of appellees to comply with the stipulations of such contract.

Except for a set-off of \$3,000.00 for the value of equipment and materials belonging to appellant Soby and admittedly taken over by appellees, the court allowed appellees' (defendants') claim as set forth in their cross-complaints in full, namely, the sum of \$53,955.43 for the cost of having the Eielson painting contract completed by Larsen.⁶

Inasmuch as appellants' specification of errors limits the issues upon this appeal to those applicable

⁵As the pleadings fully set forth the undisputed background facts, references to those portions of the voluminous transcript have been omitted.

⁶T.R., at pp. 93-95

to the Eielson contract, the analysis of the evidence and the argument to follow, will be likewise so limited.

The record shows that the total contract price for the Eielson subcontract between appellant Soby and appellees, (exclusive of extras), amounted to \$73,-662.00.⁷ Thus the sum of \$53,955.43 paid by appellees to Larsen and awarded to them by the court below as their measure of damages for the completion of the sub-contract allegedly abandoned by appellant, amounted to over 73 percent of the total agreed net contract price. It is appellants' contention that this award was excessive and is unsupported by the evidence, which appears to be uncontradicted to the effect that at the time Larsen was substituted as subcontractor for the appellant Soby, the Eielson contract, with respect to painting, had been performed to a completion of in excess of 91 percent, (*vide infra*).

In this connection, it is significant to note that the evidence shows that Larsen was able to take over Soby's work force, materials and equipment⁸ and that it was conceded that Soby had no difficulty producing satisfactory work on his Eielson contract⁹ (hence no duplication of work was required).

On December 30, 1953, after appellant Soby had left the job and before appellees had undertaken to complete it, appellees prepared and filed with the Contracting Officer for the United States an estimate of

⁷T.R., at p. 44

⁸T.R., at p. 1193

⁹T.R., at p. 62

completion of the Eielson project, for the purpose of obtaining advance payment for work performed.

This payment estimate was introduced into evidence as plaintiffs' Exhibit No. 46-1 (appellants' Appendix 1 hereto) and contains a certification on the part of appellees, to the effect that the Eielson project (identified as Contract No. 385) was 97.8 percent complete. There was also introduced in evidence as plaintiffs' Exhibit 46-2 (appellants' Appendix 2 hereto) a certificate of the Resident Engineer, the authorized representative of the United States Government with respect to this project, to the effect that the work was 97.85 percent completed, as claimed by appellees in the estimate just referred to. The evidence further shows that thereafter appellees were paid and accepted payment from the United States Government on the basis of 97.85 percent of completion.¹⁰

Trial was had in the District Court for the Territory of Alaska, Third Division, before the Honorable J. L. McCarrey, Jr. who, having previously held a pre-trial conference, opened the trial and commenced the taking of testimony on the 26th day of September, 1956. Testimony in support of the various claims of appellant and appellees, and defenses, cross-claims and defenses to cross-claims continued from day to day through the 27th day of October, 1956. At that time, arguments having been made to the court by respective counsel, the court took the matter under advise-

¹⁰T.R., at p. 1200. (This includes completion of "interior finish" at the rate of 91.18 percent, as shown on plaintiffs' Exhibits 46-1 and 46-2; Appendices 1 and 2, *infra*).

ment and, on or about the 9th day of January, 1957 the court entered its written opinion deciding the case and finding that the cross-claimants were entitled to \$81,625.85 on their first cross-claim and the sum of \$53,955.43 on their second cross-claim, and allowing appellant, by way of off-set, the sum of \$3,000.00, making a net sum due appellees, on their cross-claims, of \$132,581.28, together with interest at the rate of six percent per annum from September 1, 1956.

The following, more detailed, excerpts from the evidence, illustrate the points in issue on this appeal:

MAX KUNEY, one of appellees, in a letter¹¹ dated December 29, 1953, (defendants' Exhibit J), addressed to A. W. Murray, attorney for the appellant Soby's surety, referring to a conference attended by himself, Lloyd Johnson, his partner, and Messrs. A. W. Murray, Prince and Douglas, for the surety, stated as follows:

"It was agreed that Soby's had no trouble producing satisfactory work on his Eielson contract, but that all his trouble was on the Ladd contract. On both jobs the material specified was identical, applied to identical surfaces and the specifications were identical in every respect except 3 coats were required at Eielson and 2 coats were required at Ladd.

"Mr. Johnson stated the difference in results were entirely because Soby gave better supervision and workmanship to the Eielson job and Mr. Douglas commented that he had found that the

¹¹T.R., at pp. 62-63.

painting work rejected in Building 12 at Ladd was because of poor workmanship and was properly rejected.”

The witness, HAROLD STENSON, General Superintendent for appellees, called to testify by appellees, on direct examination by appellees’ attorney testified commencing at page 1134 of the transcript of record, with respect to the satisfactory work performed by appellant as follows:

“Q. How many buildings did you have at Eielson?

A. We had a messhall and five 3-story air-men’s dormitories.

Q. Now, how much of the painting work in those buildings had been completed at the time Soby left?

A. The three buildings—no, the two buildings and the messhall was satisfactory to the R. E.¹² inasmuch as they called A.I.O.¹³ to inspect it. Of course, then they come along and picked up a lot of little items. Now, that was the middle of December.

Q. And had the other buildings been completed?

A. No.

Q. Did you have occasion during the job to observe the painting work that the Soby Painting Company did at Eielson?

A. Oh, yes. Sure I did.

Q. What was it?

A. It was a much better job than was done on Ladd.”

¹²Resident Engineer

¹³Airforce Installation Officer

The same witness testified again, commencing on page 1155 of the transcript of record, as follows:

“Q. What, if anything, did Mr. Douglas say specifically about the quality of the work at Ladd?

A. He says it is awful.

Q. Was anything specifically said about the quality of the work at Eielson?

A. Eielson work looked all right to him which we didn't have any particular troubles out there.

The Court: Wait a minute. That doesn't have any probative value as far as this case is concerned. Will you read the answer back and I will explain to counsel why.

(Thereupon, the Reporter read the Answer, Line 22, previous page.)

The Court: Well, the court of it's (*sic*) own motion rules that that be stricken and to answer the question as directly asked.

Q. (By Mr. Olwell): Did you have any specific conversation with Mr. Douglas concerning the work at Eielson? In other words, did Mr. Douglas say anything about the work?

A. We looked over the work at Eielson and the work at Eielson looked all right.

Q. Did Mr. Douglas say anything about it?

A. No, I can't recall that he made any particular comment. I just can't recall that.

The Court: Well, the court again would strike that first answer from the record because it doesn't have any probative value. It is a conclusion that the witness states himself.

Mr. Olwell: If it please the court, the only purpose of my asking the question was that he had stated that he went to Eielson, therefore, I asked him if anything was said. He has now said he doesn't recall that Mr. Douglas said anything.

The Court: Excepting I would ask that the prior answer be read back to counsel so that you will see why the court has asked that it be stricken, if you please."

Same witness at page 1172:

"Q. Would you describe the work at Eielson, that is, the painting and taping work as generally satisfactory or acceptable?

A. Yes, generally so."

Same witness at page 1175 of the transcript of record:

"Q. How was the painting work at Eielson accomplished?

A. Soby had a foreman out there named Stover and he handled that in pretty fair shape.

Q. Did you have any——

A. Soby would go out there—make a trip out there each time he was up to Fairbanks.

Q. Did you have any complaints about the painting workmanship that was done at Eielson?

A. Nothing unusual. We had some painting difficulties on the punch list, but as I recall it now, we didn't have any redo work.

Q. There was no redo work in the sense that it was required at Ladd, is that correct?

A. No, nothing.

Q. Was the work that had to be caught up after December 19 of a normal touch-up type work at Eielson?

A. Yes, that is all."

The same witness, Superintendent Stenson, testified commencing at page 1199 of the transcript as to the percentage of completion of the Eielson job as of the date appellees took over the job, as follows:

“Q. Now, Mr. Stenson, I hand you Plaintiffs’ Exhibit 46-2¹⁴ which is turned to a document which bears the date of 31 December, 1953. Would you examine the last document.

The Court: To any particular point? It is rather lengthy. Could you indicate which point you want him to refer to.

Q. Mr. Stenson, what does Item 3 of that document that you have before you relate to?

Mr. Olwell: If your Honor please, I think it speaks for itself.

Mr. Arnell: I realize that.

The Court: Could you lead the witness then. State, I call your attention to Item No. 3 which refers to——

Q. (By Mr. Arnell): Mr. Stenson, does Item 3 which relates to completion of painting at Eielson include the painting work?

A. Yes, it would.

Q. And as of the date of December 31, 1953, how much of that particular item of the contract had been completed?

The Court: Well, counsel, speed this up. You are on cross-examination. You may, therefore, ask leading questions.

Mr. Arnell: I understand that, Your Honor.

The Court: Why don’t you then state, does that disclose so and so.

Q. (By Mr. Arnell): Mr. Stenson, does the figure of completion shown on that form total 98 point something percent complete?

A. These are the forms——

The Court: Just answer the question.

A. Will you state the question again.

¹⁴Appendix 2, *infra*

Q. Does that form show this project was 98 point something percent complete for this particular unit of the contract?

A. This is it so far as I see. I have never seen this form before. I'd like to look at it a little more.

The Court: Does it or does it not?

A. This is the amount of money that was figured on this piece of paper. That is the amount of money Kuney-Johnson received.

The Court: Does that form in Item 3 disclose that the progress of that building was 98 point fraction complete at that date?

A. That is correct.

Q. (By Mr. Arnell): Did Kuney-Johnson get paid upon the basis of that percentage of completion, Mr. Stenson?

A. To my knowledge, yes.

Mr. Arnell: May I hand the exhibit back to the clerk, your Honor?

The Court: You may. Well, counsel, doesn't it disclose 97.85 percent complete.

Mr. Arnell: I am sorry if I made a mistake.

Mr. Olwell: 97.85 your Honor?

The Court: Yes, that is correct.

Mr. Olwell: Thank you."

Appellees called TOM CORBETT, Paint Superintendent for Larsen, who took over appellant's work at Eielson, as a witness and he testified with respect to the satisfactory work appellant did at Eielson as follows:¹⁵

"The Court: Now, do you have an opinion as to the type of workmanship that was performed

¹⁵T.R., at p. 1322

on Eielson? Now, of course, I am confining it to painting only. Pardon me. Of the work that was done by Mr. Soby at the time he went on the job.

A. Well, I only found one fault with Eielson. The Eielson job was very good and the only fault being that they had paint on the decks which were concrete and didn't call for any covering, any asphalt tile, and they had to be cleaned up. Outside of that the work had been going along all right."

Appellee, MAX KUNEY, taking the stand for the second time testified with respect to the completion of the work at Eielson, commencing on page 1559 of the transcript of record, as follows:

"Q. Now, Mr. Kuney, based on Plaintiffs' Exhibit 46-1,¹⁶ if that exhibit showed as of the end of December, 1953, an average completion of all the project of approximately 93 or 94 percent, are you able to state how much money would be or how much the cost would be for finishing the work in accordance with the terms of the contract?

A. No. That again would have no relation to what it would cost to complete the contract. As a matter of fact, these estimates never in the business have much relation to actually what has been done at this stage of the game.

Q. Notwithstanding that you get paid the amount of money that is reflected by that exhibit, do you not?

A. Oh, yes, but towards the end of the job, when it is practically complete and there is a 5

¹⁶Appendix 2, *infra*

percent retainage being held it is quite often that in many cases, as far as the items themselves are concerned, they allow 100 percent on the items and just hold the 5 percent. That is common and naturally we'd accept it.

Q. Mr. Kuney, does not Plaintiff's Exhibit 46-2 reflect the actual progress of the work to the date specific in each of those instruments?

A. No, sir, it doesn't. It states on the face that it does, but, as I explained, it really has little application as is well known in our business, in our trade.

Q. Do you mean that the Government reported this particular item in the contract 97 percent complete and they paid you on that basis and yet you had not done that much work?

A. Yes, that can apply. I don't say we hadn't, understand, because—I do say this, that that is commonly done, to usually pay 99 percent just to show that there is a little something left to do—they could have done that here, as well as the 99 percent—then they hold the 5 percent retainage which they consider is enough to complete it.

Q. How much of that particular item in the contract had you completed on that date if it was not 97 percent?

Mr. Olwell: If your Honor please, I object to the form of the question because he just said 'how much of that particular item of the contract' without referring to what item. No one would know what he means.

The Court: You mean painting, do you not?

Mr. Olwell: Painting is not set forth on that exhibit. That is the reason for my objection.

The Court: Objection sustained. You may rephrase your question.

Mr. Arnell: May I look at the exhibit again, your Honor?

The Court: You may.

Q. (By Mr. Arnell): Directing your attention to plaintiff's Exhibit 46-2, Mr. Kuney, the third item is a lump sum price for construction of all the buildings at Eielsen, is it not?

A. Yes, sir.

Q. Now, is it your testimony that, notwithstanding the fact that the Government paid you 97 percent, approximately, you had not done that amount of work on those buildings?

A. No, that is not my testimony.

Q. Well, actually then you had done that amount of work, had you not?

A. That neither is my testimony. We had——

Q. Well——

A. But my testimony is this: That we had actually done less than 97.85 percent.

Q. Of Item 3 on that exhibit?

A. That is right.

Q. Now, how much less?

A. Well, after December 31, as I recall, the painting alone cost \$60,000.00, \$70,000.00. I think that probably 95 percent complete would have been a more accurate estimate on the part of the Government than 97.85."

The substance of the foregoing testimony of appellees' own witnesses may thus be deemed to be undisputed. It was on this evidence, then, that the District Court must have based that portion of the judgment here appealed from.

ISSUES PRESENTED AND SPECIFICATION OF ERRORS

1. *Where a painting subcontractor under a general building contract terminates his performance at a time when, according to official government certificate, his work has been completed in excess of 91 percent and the general contractor receives payment from the government of a like percentage of the contract price, is a subsequent expenditure, by the general contractor, of an additional 73 percent of the total contract price, for the purpose of completing the approximately 8 percent of the work remaining unfinished, such a reasonable expense in mitigation of damages, as to permit recovery of the full amount so expended by the general contractor from the painting subcontractor as damages for the latter's alleged breach in terminating performance?*

Appellants contend that the District Court erred in awarding to appellees roughly \$54,000.00, or approximately 73 percent of the total contract price for a painting subcontract at Eielson Air Force Base, near Fairbanks, Alaska, where undisputed testimony and documentary evidence show that appellees expended such sum to complete approximately 8 percent of the contract which had remained unfinished when appellant Soby terminated performance (claiming a breach of conditions and violation of specifications on the part of the appellees) and where it further appeared that appellees, upon certification by the government of approximately 98 percent completion of the contract and approximately 92 percent completion of the subcontract, received like percentages of the full contract

price; that appellees' substitute subcontractor was able to take over the work allegedly abandoned by appellant Soby, without unnecessary delay, and with said appellant's full and competent work force, materials and equipment; and that, because of satisfactory performance of the work completed by appellant Soby, it was not necessary for such substitute subcontractor to re-do any of the work included in the percentage completed by appellant Soby and for which payment was received by appellees as aforesaid. Appellants further contend that the District Court's award to appellees (defendants below) of the full amount of damages claimed in their second affirmative defense and cross-complaint, with respect to the Eielson Air Force Base subcontract, is excessive and that the District Court's Finding of Fact No. XIII, with respect thereto, and the conclusions of law based thereon, are clearly erroneous, are unsupported by any substantial evidence in the record and contrary to the rules of law applicable to the measure of damages recoverable for breach of contract.

2. *Upon the facts set forth in specification of error No. 1 above, was it proper for the District Court to award interest upon the total amount of the judgment to appellees (defendants below) from and after September 1, 1956, a date seven months and 11 days prior to the date of said judgment and the ascertainment of the theretofore wholly unliquidated amount of damages?*

Appellants contend that upon the undisputed facts and documentary evidence in this case, and assuming,

arguendo, that appellant Soby breached his contract when he (as alleged by appellees) abandoned performance, such damages as could be recovered by appellees by virtue of such breach, namely, the fair and reasonable market price of completing their performance, less credit for materials and equipment on hand and belonging to appellant Soby, were wholly unliquidated and were not and could not be finally ascertained, until after resolution of conflicting claims and counter-claims by the trier of the facts in this case and judgment thereon and hence allowance of interest on the full amount of the judgment, from and after an arbitrary date 7 months and 11 days prior thereto, was wholly unwarranted.

3. *Is there evidence in the record to support that portion of Finding of Fact No. XIII and the judgment thereon, which held appellant Soby (plaintiff below) to be entitled to an off-set in the total sum of \$3,000.00 only for the supplies and materials taken over by appellees instead of the true value thereof in the sum of \$5,768.50, as claimed by appellant Soby?*

Appellants contend that the set-off thus allowed against appellees' (defendants below) aforementioned cross-complaint is insufficient, arbitrary and not supported by the evidence in the record of this cause.

ARGUMENT

1. WHERE A PAINTING SUBCONTRACTOR UNDER A GENERAL GOVERNMENT BUILDING CONTRACT TERMINATES HIS PERFORMANCE AT A TIME WHEN, ACCORDING TO DOCUMENTARY PROOF IN THE FORM OF OFFICIAL GOVERNMENT CERTIFICATES, HIS WORK HAS BEEN COMPLETED IN EXCESS OF 91 PERCENT AND THE GENERAL CONTRACTOR RECEIVES PAYMENT FROM THE GOVERNMENT FOR SUCH WORK, AT A LIKE PERCENTAGE OF THE CONTRACT PRICE, A SUBSEQUENT EXPENDITURE, BY THE GENERAL CONTRACTOR, OF AN ADDITIONAL 73 PERCENT OF THE TOTAL CONTRACT PRICE, FOR THE PURPOSE OF COMPLETING THE APPROXIMATELY 8 PERCENT OF THE WORK REMAINING UNFINISHED, IS NOT SUCH A REASONABLE EXPENSE IN MITIGATION OF DAMAGES, AS WILL PERMIT RECOVERY OF THE FULL AMOUNT SO EXPENDED BY THE GENERAL CONTRACTOR FROM THE PAINTING SUBCONTRACTOR AS DAMAGES FOR THE LATTER'S ALLEGED BREACH IN TERMINATING PERFORMANCE AND SUCH AN AWARD IS EXCESSIVE AND UNWARRANTED.

Even in cases where the stricture of Rule 52(a) of the Federal Rules of Civil Procedure is applicable,¹⁷ findings of a trial court sitting without a jury will be reversed, even if there is evidence to support them, when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co.
(1848), 333 US 364, 394-395, 68 S.Ct. 525,
92 L.ed. 746.

¹⁷"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *".

In such cases, moreover, it has been said that while appellate courts should be slow to impute to trial courts a disregard of their duties and responsibilities or a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence, the reputation and standing of the trial judge for experience, discernment, detachment, reliability, carefulness, probity and other qualities that combine to make judgment the master's art cannot and should not be ignored and hence an important factor in applying the rule is the reliability of the trier of the facts.

5 Moore's Federal Practice (2d ed.) 2616.

The present case, however, is not subject to such narrow limitations upon review, since, as the foregoing statement of the facts discloses, the challenged findings of fact and conclusions of law of the District Court are based on documentary evidence and uncontradicted testimony and are hence subject to free review unaffected by presumptions which ordinarily accompany findings on controverted issues.

Carter Oil Co. v. McQuigg (CCA 7th, 1940), 112 F.2d 275.

Findings of fact based on such evidence, where credibility is not seriously involved or, if it is, where the reviewing court is in just as good a position as the trial court to judge credibility, are not binding on the appellate court and will be given slim weight on appeal.

Equitable Life Assurance Soc. of U. S. v. Ireland, (CCA 9th, 1941), 123 F.2d 462;

Smith v. Royal Insurance Co., Ltd., (CCA 9th, 1942), 125 F.2d 222, cert. den. (1942) 316 US 695, 62 S.Ct. 1291, 86 L.ed. 1765;

Johnson v. Griffith S. S. Co., (CCA 9th, 1945), 150 F.2d 224, 225;

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., (CA 9th, 1949), 178 F.2d 541.

And see:

Yankwich, Findings in the Light of Recent Statutory Amendments (1948), 8 FRD 271, 281-282.

The applicable rules have been clearly spelled out by Judge Frank, speaking for a majority of the Second Circuit, in *Orvis v. Higgins* (CA 2d, 1950), 180 F.2d 537, 538, cert. den. (1950) 340 US 810, 71 S.Ct. 37, 95 L.ed. 595, as follows:

“* * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides a fact issue on written evidence alone, we are as able as he is to determine credibility, and so we may disregard his finding (citing authorities). (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge’s findings and substitute our own (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful (citing authority), or (2) if the trial judge’s finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance (citing authorities). * * *”

And see also:

Kwikset Locks, Inc. v. Hillgren, (CA 9th, 1954),
210 F.2d 483, cert. den. (1954) 347 US 989,
74 S.Ct. 852, 98 L.ed. 1123;
Stevenot v. Norberg, (CA 9th, 1954), 210 F.2d
615.

Professor Moore, in commenting on the rule as thus enunciated by Judge Frank and consistently followed in this Circuit, says:

“* * * The intent as written in Rule 52’s recipe on the scope of appellate review singles out the case where the trial court had ‘the opportunity * * * to judge of the credibility of the witnesses’, and he has no such opportunity relative to non-demeanor testimony. And for litigants the pudding is the pay-off, not the cook’s intent. Aside from the intrinsic persuasiveness of Judge Frank’s opinion, its theory is a natural and proper concomitant of appellate power. It probably will and should commend itself to other circuits.”

5 Moore’s Federal Practice 2642.

Applying these rules to the case at bar, we then find the following:

(1) Documentary evidence, in the form of official government certifications (Appendices 1 and 2, *infra*) established the fact that, at the time of termination of appellant Soby’s work, the Eielson building contract was completed almost 98 percent overall, and in excess of 91 percent with respect to the interior finish; and appellees applied for and received payment in full, based upon these completion percentages;

(2) Uncontradicted testimony, in the nature of admissions by appellees' own witnesses, established the fact that appellant Soby's work at Eielson was satisfactory and that it was not necessary to re-do any part of his work, when the substitute subcontractor, Larsen, took over to complete the unfinished 8 percent of interior finishing work.

Nothing here involves demeanor testimony, or the credibility of witnesses, except possibly the purely argumentative and entirely self-serving statement on the part of appellee Kuney, to the effect that these certificates do not mean what they say, even though he admits to receipt of payment in full based thereon. Yet even Kuney, when pressed for greater specificity finally admits the accuracy of these reports within narrow limits, by stating "I think that probably 95 percent complete would have been a more accurate estimate on the part of the government than 97.85."¹⁸

Obviously, when confronted with the fabulous discrepancy between his own completion estimates and the government certificates, on the one hand, and the exorbitant price for completion paid to Larsen, on the other, the only thing Kuney *could* do was to attempt to belittle the significance of this documentary evidence. It would certainly have been too much to expect for him to admit that this variance was due to outrageous padding, feather-bedding and profiteering, resulting from the collusion of the general contractor and his hand-picked substitute subcontractor, bliss-

¹⁸T.R., at p. 1562.

fully secure in their knowledge that their platinum-plated performance would come out of the pocket of the appellant United States Fidelity and Guaranty Company, as surety for Soby.

Yet somewhere, somehow, in a strange but irresistible way, this tenuous argument must have fastened itself upon the mind of the fact finder, when several months later it blossomed forth in his opinion in the following remarkable statement:

“The percentage of plaintiff’s completion when the plaintiff abandoned the contracts, under each contract and in each building, within the contracts, posed a problem of mean concern throughout the trial. The vexation to this question was multiplied by the percentages of completion reflected in the government required reports (plaintiff’s exhibits 35 and 36, etc.).

*“While the government reports are informative, I am of the opinion that they are of little aid to the court in the determination of this problem, since the weight of evidence I find to be that such reports are only relative, and, generally speaking, little weight is attached to them by the contractor.”*¹⁹ (Emphasis supplied.)

The italicized portion of the above quote contains, in encapsulated form, the prejudicial error of which appellants complain. Faced with these documentary proofs, counter balanced by nothing more than a feeble argument against their credibility, by the very contractor who in reliance thereon has collected dollars from the government, the trial court confuses argu-

¹⁹T.R., at p. 68

ment with evidence and, so far from determining credibility, rejects that which is inherently credible in favor not of testimony, but conjecture, proceeding from unwarranted assumption to erroneous conclusion. The court below finds that "such reports²⁰ are only relative" and one may appropriately ask, *relative to what?* If by "relative" is meant unreliable, based on what "weight of evidence" does the court below so find? Even appellee Kuney himself—the last person whose word should be taken with respect to the reliability of government reports which on their face contain his own admissions impeaching his unconscionable claims—would go no farther than to quibble over the difference between 95 percent and 97.85 percent. Does this justify the finding just quoted? Even the statement "little weight is attached to them²⁰ by the contractor", while certainly of dubious probative value, is belied by the contractor's own admissions in the record, just referred to.

Appellants willingly concede that, accepting, as they must at this stage of the proceedings, the premise that appellant Soby abandoned the contract, the appellees are entitled to recover such a sum as will put them in as good a position as if the contract had been performed, and where the defect is remediable from a practical standpoint, recovery should be based on the fair market price of completing or correcting the performance. This is so, because under the generally applicable rules of law of contracts the person in-

²⁰The government certificates referred to above, appendices 1 and 2, *infra*.

jured by the breach may recover as part of his damages expenses incurred in the exercise of reasonable diligence to prevent or minimize the damage caused by such breach.

Applying this to the present case, then, the general contractor, having recovered 95 percent or more of his total contract price, was entitled to so minimize the consequences of the alleged breach on the part of appellant Soby, his paint subcontractor, as to avoid loss of the percentage retained by the government and to complete the contract to the government's satisfaction. Thus, he was clearly entitled to hire someone else to do the 8 percent of interior finishing work which appellant Soby had left undone at Eielson and indeed, appellant United States Fidelity and Guaranty Company authorized such completion.²¹

Expenses allowed under this theory, however, must be *reasonable*. Thus in the case of a breach of contract the owner is not justified in expending more than the contract (or, *mutatis mutandis*, the balance of the contract remaining unpaid or unfinished) is worth.

See: 15 Am. Jur., Damages, Sec. 147.

Where calculation shows that the amount of damages allowed is in excess of those proved or where there is no evidence whatever of a particular item of damages allowed, the award is excessive and will be set aside.

See: 15 Am. Jur., Damages, Sec. 230.

²¹T.R., at p. 64.

Here simple calculations and common sense show that if appellant Soby had completed the Eielson painting contract, by doing the remaining 8 percent of the work, based upon the agreed contract price, the cost to appellees would have been approximately \$5,900.00. Appellants concede, that a substitute subcontractor, taking over at short notice, might reasonably have exceeded this figure, although the evidence is undisputed that he was able to take over appellant Soby's work force, equipment and supplies and was thus in a position to complete the job without delay or unforeseen expenditure. It is also undisputed that he did not have to duplicate any of Soby's work because of the overall quality of the workmanship on the Eielson job. Can it then be said, *reasonably*, that when Larsen charged and appellees recovered, the sum of approximately \$54,000.00, or better than nine times the value of the remaining portion of the contract, that these are reasonable expenses and proper damages? Or should not this Court, in the exercise of its appellate supervision, as well as of common sense and fair play, modify this unconscionable award to a figure which is compensatory rather than confiscatory or, at the very least, remand the case for ascertainment of such a proper figure? Appellants respectfully contend that it should.

2. UPON THE FACTS IN THIS CASE IT WAS IMPROPER FOR THE DISTRICT COURT TO AWARD INTEREST UPON THE TOTAL AMOUNT OF THE JUDGMENT TO APPELLEES (DEFENDANTS AND CROSS-COMPLAINANTS BELOW) FROM AND AFTER SEPTEMBER 1, 1956, A DATE 7 MONTHS AND 11 DAYS PRIOR TO THE DATE OF SUCH JUDGMENT BECAUSE THE AMOUNT OF SUCH DAMAGES PRIOR TO SUCH JUDGMENT WAS WHOLLY UNLIQUIDATED AND UNASCERTAINED.

The general rule with respect to the allowance of interest is that, in the absence of contract to the contrary, interest on money runs from the time when the money becomes due and payable. This rule has been codified in Alaska in Section 52-1-1, Alaska Compiled Laws Annotated 1949, and has been construed by this Court to mean that interest may be allowed in a judgment from a date prior thereto, where the money would have been due and payable at an earlier date and, after demand, payment was refused.²²

The general rule further holds, however, that where claims involving money payments are unliquidated and involve sharply disputed items, interest should not be allowed prior to a decision of the amount due. While there are numerous cases involving building contracts, which have permitted interest to be allowed upon the award of damages for deviations or defective performance, it should be noted that all these cases involve claims based upon expressly stipulated contract prices, subject only to changes because of varying additions and deductions. In the present case, on the other hand, the claim upon which interest was al-

²²*New York Alaska Gold Dredging Co. v. Walbridge*, (CCA 9th, 1930), 38 F.2d 199.

lowed, arises out of an alleged breach of contract, whereby the claimant has mitigated his damages by permitting someone else to complete the work required by the contract and now seeks the contract price paid for such completion not as a liquidated claim based upon agreement between the parties, but as his measure of damages.

This then, is not a liquidated claim, but comes within the old common law rule, which requires that a demand should be liquidated or its amount ascertained or readily ascertainable before interest can be allowed. Even the most recent liberalizations of this rule go no further than to hold that if the amount due is capable of being ascertained *by mere computation*, the allowance of interest is proper. On the other hand, where a claim arising on contract was based in whole or in part on a *quantum meruit*, and was further subject to a reduction in an unliquidated amount because of faulty performance of the contract, it has been held that interest should not be allowed on the amount found to be due.

Stephens v. Phoenix Bridge Co., (CCA 2d, 1905), 139 F. 248;

Excelsior Terra Cotta Co. v. Harde, (N.Y., 1905), 73 N.E. 494.

In the *Stephens* case, *supra*, it appeared that the action was brought to recover the reasonable value of the materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting, under a contract between the parties by which the plaintiff undertook to complete the metal work of the structure

at a specified date, and "to be subject to a penalty of \$100 per day for any time beyond that date". Performance was not completed by the plaintiff within the time specified in the contract, and on the trial it was not disputed that the reasonable value of the labor and materials was the contract price; but the defendants were not allowed a deduction of \$100 per day for the delay, but were held to be entitled, by way of counterclaim, only to the actual damages sustained by them by the delay in the completion of the contract, and the plaintiff was held to be entitled to interest on any amount which the jury might find to have been owing by the defendants to the plaintiff when the demand became payable. The court held, however, that the sum owing from the defendants to the plaintiff was uncertain and unascertainable by computation at the time of the commencement of the action; it depended not only on what should be found to be the reasonable value of the materials and services furnished by the plaintiff, but also on the amount which it should be found ought to be deducted from the plaintiff's claim and this amount was likewise uncertain and unascertainable by computation. Hence, the court held that following the rules deducible from the New York decisions, in the absence of controlling decisions in the federal courts, interest was not allowable in the case.

In the *Excelsior* case, *supra*, which was an action to foreclose a mechanic's lien, filed for work done and materials furnished under a contract, it appeared that the complaint set up the contract, alleged its full per-

formance, and claimed a recovery, in addition to the contract price, for extra work done. The answer denied the allegations as to performance and as to extra work, and demanded, by way of counter-claim, a large sum of money for the damage occasioned by defective work and by delay in performance. The trial court made an allowance for the defective workmanship and delay in performance, disallowed the claim for extra work done, and allowed interest on the amount for which judgment was directed. It was held that a modification of this judgment, striking out the amount allowed for interest, was correct, as plaintiff's claims were, under the circumstances, unliquidated. The court said:

“They were, in fact, upon *quantum meruit*. The finding of the trial court established that the claim under the contract was subject to a reduction, because of defective and dilatory performance, to the extent of nearly one-third of its amount; while the claim for extra work was wholly disallowed. This case comes within the authority of *Delafield v. Westfield*, (1899), 58 N.Y.S. 277, where the plaintiff's claim, which was in part upon contract, and in part for extra work, was reduced by an award of damages for failure in performance. The appellate division there held that, as the amount, when ascertained, was subject to a reduction for damages sustained by the defendant for improper performance of the work, and the amount due for extra work could only be ascertained by proofs, the plaintiff's claims were unliquidated, and that, therefore, interest was not recoverable.”

This Court in the *Walbridge* case (note 22, *supra*), has indicated that where the action is upon mutual accounts between the parties which can only be ascertained by mutual set-offs and allowances, a claim would be held to be unliquidated. That interest is not recoverable on unliquidated claims has been reasserted by this Court fairly recently in an Alaska case, involving recovery by a seller from a buyer under an implied promise to pay a reasonable amount.

Columbia Lumber Co., Inc. v. Agostino, (CA 9th, 1950), 13 Alaska 34, 184 F.2d 731.

In the case at bar, we find a claim based upon an alleged breach of a contract for the performance of labor and furnishing of materials by appellant Soby, and a showing that appellees sought to cure this breach by securing the completion of his work through another subcontractor. They are, therefore, seeking damages measured by the reasonable cost of completing the contract, limited in turn by the fair market value of the services rendered by the substitute subcontractor. Against this, appellant Soby sought, and received, a set-off for the fair value of certain supplies, materials and equipment admittedly left behind by him and taken over by appellees in completing their work. It appears clearly upon the foregoing authorities, that under these circumstances the amount of money due to appellees was not fully ascertained until the date of judgment and that allowance of interest back dated to an arbitrary date, apparently picked at random, was unauthorized and should be modified.

3. **THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE TRIAL COURT'S FINDING OF FACT NO XIII AND THE JUDGMENT THEREON, WHICH HELD APPELLANT SOBY (PLAINTIFF BELOW) TO BE ENTITLED TO AN OFF-SET IN THE TOTAL SUM OF \$3,000.00 ONLY FOR THE SUPPLIES AND MATERIALS TAKEN OVER BY APPELLEES, INSTEAD OF THE TRUE VALUE THEREOF IN THE SUM OF \$5,768.50, AS CLAIMED BY APPELLANT SOBY.**

There is no dispute with respect to the assertion that appellee took over the materials, equipment and supplies belonging to appellant Soby which they found on the job when they retained Larsen to complete the contract. The only issue apparently was on the value of these items, which Soby claimed was in excess of \$5700.00, but for which appellees had allowed only slightly over \$600.00. Allowance by the trial court of the sum of \$3000.00 is entirely arbitrary and wholly unsupported by any evidence whatsoever in the record. While the trier of fact is obviously free to choose between conflicting evidence, his findings must be supported by some competent evidence and by some discernible mental process of computation, evaluation or ascertainment. To pull a figure out of a hat, so to speak, is purely arbitrary and capricious. Accordingly, if this Honorable Court modifies the judgment or remands this cause for further proceedings, this modification to remand should include the item of set-off referred to hereinabove.

CONCLUSION

Based upon the reasons and the authorities stated above, appellants earnestly contend that the judgment below should be modified or, in the alternative, should be reversed and the cause remanded with instructions to make new findings upon the disputed items, either based upon the record as it now exists or upon such other evidence as may be necessary to make such determination.

Respectfully submitted,

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(Appendices Follow.)

No. 15843 ✓

IN THE

*See also
Vol. 3082*

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

MAR 19 1959

PAUL P. O'BRIEN, CLERK





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I.

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Appendix A. Government's Exhibit 2-A and 2-B in evidence, being Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization.

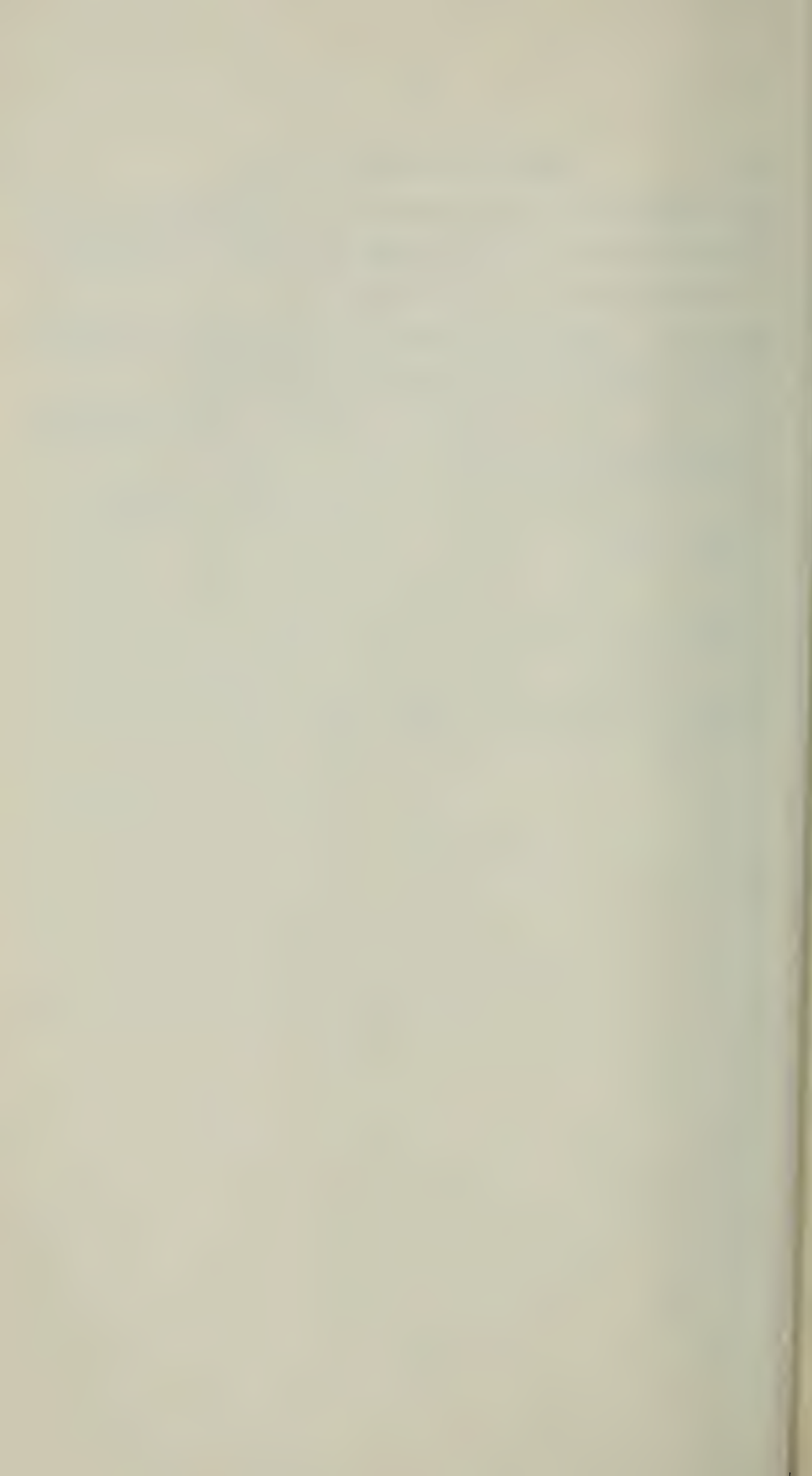
Appendix B. Government's Exhibit 2-F and 2-G in evidence being Triplicate copy of Petition for Naturalization.

Appendix C. Second Amended Complaint to Set Aside and Cancel Naturalization—filed April 21, 1955.

Appendix D. Answer to Second Amended Complaint filed November 7, 1955.

Appendix E. Findings of Fact, Conclusions of Law and Judgment, Docketed and Entered April 24, 1957.

Appendix F. List of Government's and Defendant's Exhibits with page numbers in Transcript of Record.



No. 15843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the original complaint and the second amended complaint¹ to set aside and cancel naturalization pursuant to the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451(a), 1952 Ed.).

This Court has jurisdiction of this appeal pursuant to the provisions of Title 28, United States Code, Section 1291, the findings, conclusions and judgment of the District Court (Appx. C) being a final order.

¹We attach as an appendix to this brief, marked "Appendix C", "Appendix D" and "Appendix E", respectively, copies of the Second Amended Complaint, Answer to the Second Amended Complaint, and the Findings, Conclusions and Judgment of the District Court.

Statutes and Regulations Involved.

The complaint to denaturalize was brought pursuant to Section 340(a) of the Nationality Act of 1952 (66 Stat. 260) (8 U. S. C. 1451(a), 1952 Ed.), which reads in part as follows:

“§1451. *Revocation of naturalization—Concealment of material evidence; refusal to testify.*

“(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen *may reside* at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by *concealment of a material fact* or by *willful misrepresentation*, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate. . . .” (Emphasis added.)

Defendant was naturalized on the 28th of November, 1940. The Nationality Act of 1940 did not become effective until 90 days after October 14, 1940, and is therefore not applicable. The Immigration and Nationality Act of 1906 (34 Stat. 596), as amended by the Act of March 2, 1929 (45 Stat. 1512), is applicable. Sections 4, 9, 11 and 28 read in pertinent part as follows:

“SEC. 4. That an alien may be admitted to become a citizen of the United States in the following manner *and not otherwise*:

“First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name, to the prince, potentate, state, or sovereignty to which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration. (Emphasis added.)

“Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to

become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition; *Provided*, That if he has filed his declaration before the passage of this Act he shall not be required to sign the petition in his own handwriting.

“The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and *that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.* (Emphasis added.)

“As to each period of residence at any place in the country where the petitioner resides at the time of filing his petition, there shall be included in the petition the affidavits of at least two credible witnesses,

citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such period has been a person of good moral character.

“At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

“Third. He shall, before he is admitted to citizenship, *declare on oath in open court that he will support the Constitution of the United States*, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, *and bear true faith and allegiance to the same*.

“Fourth. No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) *during all the periods referred to in this subdivision he has behaved as a*

person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the country where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition. If the petitioner has resided in two or more places in such county and for this reason two witnesses can not be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence, in addition to the affidavits required by this Act to be included in the petition. At the hearing, residence within the United States but outside the county, and the other qualifications required by this subdivision during such residence shall be proved either by depositions made before a naturalization examiner or by the oral testimony of at least two such witnesses for each place of residence. (Emphasis added.)

* * * * *

“SEC. 9. That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

* * * * *

“SEC. 11. *That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings* for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, *and be heard in opposition to the granting of any petition* in naturalization proceedings.” (This section in the 1952 Act is found in 8 U. S. C. 3447(d).) (Emphasis added.)

* * * * *

“SEC. 28. The Commissioner of Naturalization, with the approval of the Secretary of Labor, shall make such rules and regulations and such changes in the forms prescribed by section 27 of this Act as may be necessary to carry into effect the provisions of the naturalization laws. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this Act shall be admitted in evidence equally with the originals in any and all proceedings under this Act and in all cases in which the originals thereof might be admissible as evidence.”

It was not until the Act of 1940 became effective that the provision was made (8 U. S. C. 705) that no person should be naturalized as a citizen of the United States who “believes in, advises, advocates or teaches, or who is a member of or affiliated with any organization, association, society or group that believes in, advises, advocates or teaches (1) the overthrow by force or violence of the Government of the United States or of all forms of law.”

The complaint is therefore predicated upon the requirements of the 1906 Act, as amended, as above set out, and upon the taking of the oath in open court as provided in

the 1906 Act and as contained in the Petition for Naturalization which contains the provisions, "I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of (which) at this time I am a subject (or citizen) . . ."

Regulations.

The pertinent regulations of the Immigration and Naturalization Service which were applicable at the time of defendant's naturalization on November 28, 1940, and codified in Title 8, Code of Federal Regulations, Subchapter C, Part 70, are contained in the basic volume containing regulations in effect June 1, 1938. The 1939 and 1940 Supplements to the Code of Federal Regulations do not contain any changes which are pertinent in this case.

The pertinent portions of regulations which are contained in Section 70.7, 70.18, 70.20, 76.1, 76.4 and 76.7 of Title 8, Code of Federal Regulations, read as follows:

"70.7. Preliminary examinations; manner of conducting; facts to be ascertained.

"Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and

morally qualified for citizenship, *is attached to the principles of the Constitution*, and is well disposed to the good order and happiness of the United States. *The question of possible arrests must be thoroughly covered. If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted.* Particular attention must be given to the determination of the applicant's marital history and the whereabouts of his wife and minor children. The questions will be repeated in different form and elaborated until the examiner is satisfied the person being interrogated fully understands them. *The witnesses shall be questioned to develop not only their own credibility and competency but the extent of their personal knowledge of the applicant's residence, moral character, and attachment to the principles of the Constitution.* Search will be made of appropriate court and other records in establishing the qualifications of the applicant and the witnesses. (Emphasis added.)

* * * * *

“70.18. *Preliminary hearings upon petitions for naturalization by designated examiners; how conducted.* Preliminary hearings upon petitions for naturalization by examiners or officers of the Immigration and Naturalization Service designated by the judge or senior judge of any United States District Court pursuant to the Act of June 8, 1926 (44 Stat. 709; 8 U. S. C. 339a), shall be conducted at such times and places as may be fixed by the designated examiner or officer upon the approval of the appropriate district director. All notices to petitioners to appear at such hearings, if necessary, shall be given to them by the district director or divisional director,

as the case may be. Such hearings shall be open to the general public and shall be conducted in the orderly and dignified manner usual to a court proceeding. They shall be conducted in person by the designated examiner or officer, who must have before him in person the petitioner and his witnesses. Each petitioner and his witnesses shall be first duly sworn by the designated examiner or officer. The examination thereafter shall be thorough and courteous in manner, scrupulously fair, and free from prejudice or bias. The designated examiner or officer shall have before him at the preliminary hearing the record of the administrative examination in each case. He will not, however, be limited to the information contained in such record, but may use any material evidence or data received from other sources and may use and examine other witnesses than those produced by the petitioner. After the conclusion of the preliminary hearing in each case where a favorable recommendation is to be made to the court the petitioner may be told when to appear before the court for final hearing or that he will be notified of the day. The witnesses in such a case may be excused from further appearance. In any case where the recommendation is unfavorable the designated examiner will inform the petitioner of his right to appear before the court in person with his witnesses for the final hearing, of which date he shall be notified.

* * * * *

“70.20. *Record of preliminary naturalization hearing.* At the time the designated examiner or officer conducts the preliminary hearing of each petitioner for naturalization he will enter on Form 2355 the petition number, petitioner’s name, and, upon completion of the examination, fill in the symbols indicating his findings and a brief notation of the reasons

for any unfavorable findings. This docket (Form 2355) shall be signed by him and shall be made available to the judge whenever desired, and after the final hearing filed of record in the field office. (44 Stat. 709; 8 U. S. C. 399a.)

* * * * *

"76.1. *Preliminary form; to whom sent; when fee for certificate of arrival to accompany.* Each prospective petitioner for naturalization shall be required to fill out properly, sign, and forward to the appropriate district director Preliminary Application Form No. A-2214, accompanied by two photographs of the applicant in accordance with Part 74, and the applicant's Declaration of Intention if one be required. The application shall also be accompanied by the statutory fee of \$2.50 in the form of a money order made out 'Payable to the order of the Commissioner of Immigration and Naturalization, Washington, D. C.' for the necessary certificate of arrival, if the entry of the applicant into the United States occurred (a) after June 29, 1906, and a certificate of arrival is required to support a petition for naturalization, although a declaration of intention is not required, or (b) where the entry was after June 29, 1906, and the declaration of intention was made prior to July 1, 1929. (Sec. 3, 48 Stat. 597; 8 U. S. C. 380a.)

* * * * *

"76.4. *Oath of petitioner and witnesses.* The petition for naturalization shall be executed under oath or affirmation. The following shall be administered to the petitioner:

"You do swear (affirm) that you know the contents of this petition for naturalization subscribed by you, that the same are true to the best of your own knowledge, except as to matters therein stated to be al-

leged upon information and belief, and that as to those matters you believe them to be true, and that this petition was signed by you with your full, true name: So help you God.

“The following shall be administered to each of the witnesses who verify the petition:

“You do swear (affirm) that the statements of fact you have made in the affidavit of this petition for naturalization subscribed by you are true to the best of your knowledge and belief; So help you God. (Sec. 4 (2), 34 Stat. 597; sec. 6, 45 Stat. 1513; 8 U. S. C. 379.)

* * * * *

“76.7. *Proof of residence, good moral character, and other qualifications; depositions.* The applicant for naturalization, except one granted special exemption from the usual residential requirements by the naturalization laws, must have the petition for naturalization verified at the time it is filed, by the affidavits of at least two credible witnesses, citizens of the United States, for each period of residence at any place in the county in which the petitioner resides at the time of filing the petition. Each such witness shall state in his affidavit that he has personally known the petitioner to have been a resident at such place for such period and that the petitioner is and during all such period has been a person of good moral character. No alien, except one otherwise specifically exempted by the naturalization laws, shall be admitted to citizenship unless (a) immediately preceding the date of his petition he has resided continuously within the United States for at least five years and for at least six months within the county where he resided at the time he filed his petition; (b) he has resided continuously within the United States from the date

of his petition up to the time of his admission to citizenship; (c) during all the periods herein referred to he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition and the other qualifications required during such residence shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required to be included in the petition. If the petitioner has resided in two or more places in the county in which he resided at the time of filing his petition, and for this reason two witnesses cannot be procured to testify as to all such residence, it may be proved by the oral testimony of two such witnesses for each such place of residence. At the hearing, residence within the United States but outside the county, and the other qualifications required during such residence shall be proved either by deposition made before a naturalization examiner or by oral testimony of at least two such witnesses for each place of residence. (Sec. 4(2), 34 Stat. 597; sec. 6(a), (b), 45 Stat. 1513; 8 U. S. C. 379, 382.)”

Statement of the Case.

This is an action for denaturalization, based upon two causes of action stated in the Second Amended Complaint (Appx. C). The First Cause of Action alleges merely intentional concealment of material facts prior to naturalization and that those facts are (Appx. C, par. V): (1) That prior to and at the time of filing said petition for naturalization defendant was an active member and officer of the Communist Party; (2) That prior to naturalization the defendant had been arrested and charged with viola-

tions outlined in paragraph V of the First Cause of Action; and (3) during the 5 years immediately preceding naturalization defendant did not behave as a person of good moral character. No proof as to the nature and aims of the Communist Party, or the defendant's knowledge thereof, is necessary under the First Cause of Action. Proof of concealment of any one of the three items alleged in the First Cause of Action is sufficient to sustain a judgment of denaturalization. Proof of concealment of any one of the arrests alleged in item (2) is sufficient.

The Second Cause of Action alleges willful misrepresentation in that in the proceedings which led to his naturalization the defendant (1) intentionally and falsely represented that the only organization to which he belonged was the "Fraternal Benefit Society of International Workers Order," and no others; that he had never belonged to any Communist, Nazi or Facist organization, when in truth and fact he had been an active member and officer of the Communist Party of the United States from on or about the year 1926; (2) intentionally and falsely represented that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States and it was his intention to renounce allegiance to any other state or potentate; and (3) intentionally and falsely represented that he had never been arrested or charged with any violation of law of the United States or state or any city ordinance or traffic regulation. With regard to item (1), misrepresentation as to organizations to which he belonged, and item (3), misrepresentations that he had never been arrested, etc., the issue of the nature and aims of the Communist Party or the defendant's knowledge thereof are still not put in issue by the pleadings and the real issue is the question of intentional misrepresentation. However, with regard to the misrepresentation alleged under item (2), as to appellant's "attachment" and "allegiance" to the

United States, the issue does arise as to his state of mind and proof of the nature and aims of the Communist Party, and the defendant's knowledge thereof is an essential element because it is alleged that by reason of the defendant's knowledge of the nature and principles of the Communist Party and his membership therein that he was *not* "attached to the principles of the Constitution" and he *did not have* any "intention to renounce" allegiance to a foreign state. It is as to this phase of the case that appellant's arguments with regard to the Supreme Court decisions in the *Nowak* and *Maisenberg* cases are directed. That those cases are clearly distinguishable is covered in Point II of our argument.

The question is now raised for the first time and appellant should therefore be barred from raising it on appeal, as to whether or not any of the arrests concealed by the appellant, as alleged in the First Cause of Action and likewise alleged to be misrepresented in the Second Cause of Action, were or were not illegal. The point is immaterial as discussed under our Point I, as to either the concealment or misrepresentation action even if appellant had standing to raise the question at this point.

The third problem raised by appellant is the question of *res judicata* of the naturalization decree. While there seems little merit to the contention, the question was extensively treated in a memorandum for the District Court and we again treat all of the important cases in Point III of this brief.

Since a denaturalization case essentially involves the petition for naturalization and the examination of the applicant by the Immigration and Naturalization Service, the documents which reflect those proceedings are particularly important. Since the exhibits are in their original form on this appeal, appellee has reproduced as Appendices "A" and "B" to this brief Government's Exhibits 2A and

2B and Government's Exhibits 2F and 2G which are the preliminary forms for application for naturalization, and the triplicate original of the petition for naturalization upon which the notations of the Immigration Examiners were made.

In reading the testimony of Calvin Derringer, the Naturalization Examiner and the first witness for the Government in the action, it is almost essential that the Court have before it these two documents to understand the testimony.

Appendices "C," "D," and "E," reproduce the Second Amended Complaint, the Answer thereto, and the Court's Findings, Conclusions and Judgment, respectively. These documents were not available in the Transcript of Record at the time this brief was prepared.

In addition, there is attached to this brief, as Appendix "F," a list of the Government's Exhibits and Defendant's Exhibits which are before the Court in their original form, indicating pages in the Transcript of Record where such exhibits are referred to. A list of such exhibits was marked "Government's Exhibit I for Identification."

As the complaint is drawn, and the case was tried and the Findings and Judgment were entered, any one ground of concealment or misrepresentation, such as concealment of arrests, or concealment of membership in the Communist Party, is alone sufficient to sustain the judgment of denaturalization.

ARGUMENT.

I.

There Is Clear, Unequivocal and Convincing Evidence That Appellant Misrepresented That He Was a Person "Attached to the Principles of the Constitution of the United States" and That He Would Bear "True Faith and Allegiance to the United States," and the Judgment of Denaturalization Should Stand on Those Grounds, as Well as on the Grounds of Concealment of Prior Arrests and Concealment of Membership and Officership in the Communist Party.

Under Point One in appellant's brief (App. Br. 4), he apparently desires to argue the applicability of the *Nowak* and *Maisenberg* cases, (*Maisenberg v. United States*, 356 U. S. 670, and *Nowak v. United States*, 356 U. S. 660). He says that "The findings are without support in the evidence." It is difficult to determine which findings he is referring to. The heading of appellant's Point I indicates he is referring to the findings of "concealment regarding membership in the Communist Party," (Count I) whereas, the argument relates to evidence as to knowledge of the nature and aims of the Communist Party or advocacy thereof, which evidence was offered as to the allegations in Count Two in the Second Amended Complaint and the portions of paragraph II, Sub. (2) thereof as to misrepresentation of "attachment to the Constitution" and "allegiance to the United States."

Appellant's argument (App. Br. 6) practically concedes that the Government's case proved he was an active member, leader and functionary of the Communist Party, and it can hardly be disputed from the testimony of Calvin Derringer that this fact was concealed by Mr. Chaunt [T. R. 22, 32-34, 40-42]. This is an issue raised by Count One and requires no proof as to the nature or aims of the Communist Party or appellant's knowledge thereof.

It is in this respect, as well as others, that the instant case is so distinguishable from the *Nowak* and *Maisenberg* cases, *supra*. In neither of those cases was the defendant categorically questioned by the naturalization examiner concerning his organizational memberships generally, or with respect to possible Communistic beliefs specifically. In both *Nowak* and *Maisenberg*, the Government relied on the now well-known Question 28, which the Supreme Court held to be ambiguous. That question was never relied on in the present case.

In the instant case, on the other hand, the district court has found as fact that the defendant intentionally and falsely represented that the only organization to which he belonged was the "Fraternal Benefit Society of International Workers Order," and no others; that Naturalization Examiner Reuben E. Wilson had asked him, "Do you believe in Communism, Fascism or Naziism?" and he intentionally and falsely answered "No"; and that the defendant had in fact been an active member and officer of the Communist Party since 1926 [Finding V, Count Two, Appendix E]. In the *Nowak* case, the District Court found that such categorical questions had not been asked (*United States v. Nowak*, 133 Fed. Supp. 191 (E. D. Mich., 1955)).

The questions put to this defendant were sufficiently clear to put him on notice that the examiner was inquiring into possible Communist membership or beliefs. His wilful concealment of such membership and beliefs, when specifically asked, is ground for revocation (*United States v. Sweet*, 106 Fed. Supp. 634 (E. D. Mich., 1952), and *United States v. Charnowola*, 109 Fed. Supp. 810 (E. D. Mich., 1953), both affirmed 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U.S. 817; *United States v. Chandler*, 152 Fed. Supp. 169 (D. Md., 1957)).

Perhaps, to make the issue clear, it would be well to set out at this point the allegations in Paragraph II of the

Second Cause of Action relating to misrepresentation of "attachment" and "allegiance," which are as follows:

"Said order admitting defendant to citizenship and said Certificate of Naturalization were procured by defendant by willful misrepresentation in that defendant in the proceedings which lead to his naturalization . . . (2) intentionally and falsely represented that during the five years immediately preceding the date of his Petition for Naturalization defendant was, and behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, and intentionally and falsely represented that it was the defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, estate or sovereignty, and that it was his intention to bear true faith and allegiance to the United States of America and to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, whereas, in truth and in fact, by reason of defendant's membership in, and his knowledge of the nature and principles of the Communist Party, the defendant was not and had not behaved as a person attached to the principles of the Constitution of the United States or well disposed to the good order and happiness of the United States, and it was not defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and it was not his intention to bear true faith and allegiance to the United States of America or to support or defend the Constitution and laws of the United States of America against all enemies, foreign and domestic."

This allegation follows very closely the provisions of the statute setting out the requirements for naturalization

(*supra*, under Statutes and Regulations and, in particular, the naturalization statute, Section 4, subparts Second, Third and Fourth). [Finding VIII, Second Cause of Action, Appendix E.]

In order to prove concealment of the requirement of "attachment" and "allegiance," appellee relies upon Question 25 in the Preliminary Form for Petition for Naturalization, which was Exhibit 2B (Appendix A) which inquires whether or not the applicant has read the oath of allegiance and is willing to take the oath in becoming a citizen, and the certification at the bottom of that form that the statements made in the form are true to the best of the appellant's knowledge and belief, plus appellant's oral statements under oath to the Immigration Examiner Reuben E. Wilson as reflected in his written notation on Exhibit 2G "R.E.W. AC" [T. R. 61, 71]. Appellee further relies upon the oath which was administered by the Court at the time of the naturalization, as required by Section 4 of the statute, subsection Third (*supra*).

It is clear from the testimony of Calvin Derringer, the Immigration Examiner, that not only did Mr. Chaunt fill out the answers "Yes" to Question 25, in both places provided on the form (see Appendix B), and signed that petition, but he was again orally asked the questions under oath by Mr. Derringer, and reiterated the answers, as indicated by the fact that the answers on said exhibit (see Appendices A and B) are circled by Mr. Derringer [T. R. 39-41]. There is no question that at the time the appellant was naturalized he took the statutory oath before the Court to support the Constitution of the United States and renounce all allegiance to any foreign state, and to bear true faith and allegiance to the United States.

The real issue as to the allegations of lack of "attachment" and lack of "allegiance" (*supra*) insofar as the evidence is concerned, is whether or not, at the times the appellant made these statements under oath, and for five years prior thereto, and at the time he took the oath of

allegiance, by reason of his membership in the Communist Party and his knowledge of the aims and objectives thereof, and its international character and domination by the Russian Government, he had a state of mind which was that of attachment to the Constitution and allegiance to the United States or whether, as alleged in Count Two of the complaint, he in truth and in fact *was not* and *had not behaved as* a person attached to the Constitution, and it *was not* his intention to bear true faith and allegiance to the United States of America.

We must further distinguish the argument in appellant's brief (App. Br. 6), where it is said that proof of active membership and leadership in the Communist Party "does not suffice to make out the Government's case, for Congress in the Immigration and Naturalization Act of 1952 has not made membership or holding office in the Communist Party a ground for loss of citizenship." Nowhere in the complaint is it alleged that *membership* in the Communist Party is a ground for loss of citizenship, nor is that issue raised under the Second Cause of Action or the allegations above set out. What is raised in the First Cause of Action, among other items, is the issue of "*concealment*" of a material fact, to-wit, concealment of membership in the Communist Party, which is quite a different thing.

Concealment of arrests or concealment of membership in an organization, revelation of either of which might have lead the Immigration Service to make further investigation of the appellant, is sufficient grounds upon which to base a decree of denaturalization. See *United States v. Corrado*, 121 Fed. Supp. 75, 227 F. 2d 780, cert. den. 351 U. S. 925; *Stacher v. United States*, 258 F. 2d 112, cert. den. 358 U. S. 907, and a more detailed discussion of this under Point II of this brief.

We turn now to the evidence with regard to the state of mind of the appellant at the time that he represented

to the Immigration Service in answer to Question 25 that he was willing to take the oath of allegiance and attachment, and at the time that he actually took the oath of allegiance and attachment.

The appellant did not take the witness stand on his own behalf to either admit, deny or explain, with regard to any of the evidence offered by appellee, or as to any of the issues raised by the complaint. He was called as a witness by appellee under Rule 43(b), and declined to answer any of the questions which were asked him, so that as Judge Yankwich said in the case of *United States v. Title*, 132 Fed. Supp. 185, at 188, "The failure to testify leaves the record without any defensive matter except such as is contained in the cross-examination of the Government's witnesses and some documentary evidence offered by the defendant" Moreover, Judge Yankwich further indicated in the *Title* case, there is a "justifiable inference(s) permitted from failure to produce evidence which it was in the power of the defendant to produce," and there is a clear distinction between that justifiable inference, and the fact that no unfavorable inference could be drawn from the fact of assertion of the claim of privilege. As this Court said in *Jiminez v. Barker* (1958), 252 F. 2d 550, where he declines to answer the questions he accepts the hazards that follow.

So we do not have in this case any expression from the defendant with regard to his own state of mind at and prior to the time he took the oath of naturalization. Other than that, state of mind is a question which is proved by evidence of acts and conduct which is the basis of the appellee's case here on this point.

See also the following cases:

Local 167 International Brotherhood of Teamsters v. United States of America (S. Ct., 1934), 291 U. S. 293;

Anderson v. United States of America (5 Cir., 1950), 185 F. 2d 243;

Williams v. United States of America (5 Cir., 1952), 199 F. 2d 921;

Kent v. United States of America (5 Cir., 1946), 157 F. 2d 1.

Without minutely summarizing the testimony of John Lautner there is little question but that Exhibits 17, 18, 27 and 28 in evidence, were the "textbooks" of the Communist Party and set forth the Communist doctrines which sustain the allegations in paragraph III of the Second Cause of Action, that the Communist Party advised, advocated and taught and caused to be written, circulated, published and distributed printed matter which taught the duty, necessity and propriety of overthrowing by force and violence the Government of the United States.

We proceed then to the particular evidence which indicates the knowledge of the appellant at and prior to the date of his naturalization on November 28, 1940, of the aims and objectives of, and his participation in the program of, the Communist Party of the United States, and his knowledge of the fact that said Communist Party of the United States, was a section of an international organization called "The Communist International," and that decisions made by the international organization were binding upon the Communist Party of the United States and the individual members thereof, as alleged in paragraph IV of Count Two.

Perhaps it would be well, before outlining the activities of the defendant as related by the witnesses, if we call attention to what this case is *not*. It is *not* a case where membership in the Communist Party is sought to be proved only by evidence of attendance at secret or "closed" meetings. It is *not* a case in which the defendant's knowl-

edge of the aims of, or his belief in, the Communist Party is sought to be proven by "so-called government witnesses," who have left the Communist Party and as to which there have been claims they were previously discredited. It is *not* a case where the Government relies on oral testimony only.

It is a case in which the Government relies on the testimony of some witnesses who were members of the Communist Party; some witnesses who had absolutely no connection with and never were members of the Communist Party; on documentary evidence such as four Communist Party membership books personally signed by the defendant, Peter Chaunt, as a District Organizer [T. R. Vol. V, 193-197; Exs. 4, 5, 6 and 7 in evidence]; articles written by the defendant, Peter Chaunt, and published in newspapers; and testimony by competent, percipient and reliable witnesses, unimpeached, who testified to the defendant's activities over a long period, starting in 1930 through 1940 when he was naturalized, and after. It is a case in which the activities of Peter Chaunt as a District Organizer of the Communist Party and as a high "functionary," in a position of leadership in that party, is well established by several witnesses including the witness, John Lautner, who likewise, during his membership in the Communist Party, was also a District Organizer, functioning in identical capacities, with identical duties and functions, and a witness who personally knew and associated and worked with the defendant over a long period of time in these capacities. It is a case in which the witnesses did not know each other, never were associated, but each had occasion to meet or work with the defendant Chaunt in various places in the United States in which he operated—in St. Louis, Missouri, in Hamilton, Ontario, in Buffalo, New York, and elsewhere.

Volumes IV through VII of the Transcript of Record, pages 1-550, consists of the testimony of these witnesses

and is a detailed recital of the occasions and events over a period of ten years prior to the defendant's naturalization as to which they were competent to testify. For a clear understanding of the breadth and scope of the evidence regarding the defendant, it is necessary to read those 550 pages. In this brief we suggest only the outline of the defendant's activities.

The evidence starts with the years 1928 and 1929. The witness Lautner [T. R. Vol. V, 287-314, 326-353; Vol. VI, 356-483; Vol. VII, 516-525] testified that the defendant in those years was working in Akron, Ohio, in the Young Communist League, along with Betty Garnett [T. R. Vol. VI, 417].

The next activity we find the defendant engaged in is about the year 1930 when he was District Organizer of the Communist Party, District 15, which was located in Connecticut. At that time not only was the defendant District Organizer, but according to Exhibit 8, which is a copy of the Daily Worker dated January 22, 1930, he was a speaker at a Lenin memorial.

We have testimony on cross-examination of witness Lautner that the Communist Party annually had these memorials and that the district organizers of the various districts were usually the speakers.

During the same year of 1930, the defendant Peter Chaunt wrote an article in the Daily Worker, entitled "Offensive Strategy, by Peter Chaunt, District Organizer, District 15." His name was also mentioned in another article in the Daily Worker dated February 10, 1930, as a Communist Party organizer for the particular district.

The defendant was a District Organizer in the Buffalo, New York, District of the Communist Party, District No. 4. Witness Kalke [T. R. Vol. IV, 112-183] met the defendant during that time, either the winter of 1930 or 1931, in the offices of the Unemployed in Council, in New

York and the testimony is that the Unemployed Council was an instrumentality of the Communist Party in the sense that it was used by the Communist Party to foster its ends.

At the time the witness Kalke met the defendant, the defendant introduced himself as the new District Organizer of the Communist Party in Buffalo, New York. A few weeks later the defendant assigned witness Kalke, as a member of the Communist Party, to do agitational work in the Broadway Auditorium in connection with an unemployed demonstration which was to take place later. On the morning of the unemployed demonstration we find the defendant in the offices of the International Labor Defense, instructing witness Kalke and others including Joseph Bogdon and Elvi Wekmark as to what they should do in connection with the demonstration. Witness Kalke was to go to the Common Council, and to make a speech after he would be introduced by a person by the name of Hall, the International Labor Defense Director, which witness Kalke did [T. R. Vol. IV, 119].

We next find the defendant at a convention of the Young Communist League in Rochester, New York, where he was again introduced as the District Organizer for the Communist Party, and he spoke to the convention concerning the work of the Young Communist League and what its function was in connection with the Communist Party [T. R. Vol. IV, 122].

Later we find the defendant in about April of 1931 at a meeting of the Young Communist League committee, criticizing witness Kalke for his lack of militancy in the Communist Party and telling him that in order to give him a chance to redeem himself he would send him as a colonizer to Syracuse, New York [T. R. Vol. IV, 129]. And he also gave witness Kalke the name of the person he was to contact in Syracuse, New York. And witness

Kalke did go to Syracuse, New York, and contact this particular person.

The defendant later had contact with witness Kalke in the Communist Party headquarters in New York and allowed the witness to work in the International Labor Defense. While witness Kalke was working in the International Labor Defense the defendant told him about certain persons who had been arrested in Niagara Falls and advised witness Kalke to go to Niagara Falls and try to secure aid for them and to go into court, if necessary, and protest the convictions.

In addition to this, we find the defendant's name appearing in the Daily Worker of January 23, 1931 [Ex. 11 in evidence], in connection with a plan that Peter Chaunt had outlined for a problem that existed in Little Rock, Arkansas.

For three days during the year 1931 the defendant, along with Witness Lautner, taught Leninism at a training school for Communism in the Canadian Party, in Hamilton, Ontario [T. R. Vol. V, 292]. In this activity the defendant was expounding the very matters which are at issue here and as to which we have the question of his state of mind [T. R. Vol. V, 296].

Later we find the defendant, between about 1932 to about 1935, as District Organizer in the St. Louis, Missouri, area. There witness George E. Duemler (never a member of the Communist Party), an attorney for the United States Department of Labor since 1939, and at that time an attorney representing a large number of unions and various other organizations, came in contact with the defendant [T. R. Vol. V, 208-239]. Witness Duemler particularly remembers a convention of the Continental Congress of Workers and Farmers which was held in Columbus, Missouri, on July 3, 1933. Before the convention took place the defendant came to witness

Duemler and asked him to furnish credentials for the Communist Party to be admitted as a member of this Continental Congress. He was refused.

At the time of the convention the defendant marched in with his followers and demanded that the Communist Party and other organizations that he purported to represent be admitted to this Congress. Exhibit 37, which is a part of a newspaper, The Columbia Missourian, dated July 3, 1933, ran a story on the matter.

During the period of time, which was approximately two years, that Mr. Duemler was acquainted with the defendant, he had occasion to come in contact with him frequently. On all of these occasions the defendant, Peter Chaunt, sought to have Mr. Duemler join in with the Communist Party in some sort of activity.

On one occasion in February, 1944, the defendant delivered a protest to the Austrian Consul as spokesman for the Communist Party of the United States.

The defendant also admitted to the witness George E. Duemler that he was the District Organizer of the Communist Party in the St. Louis area. Mr. Chaunt, in the St. Louis area, was known as "Mr. Communist."

While the defendant was District Organizer in St. Louis we also have his name appearing on two occasions as the District Organizer of the Communist Party in news stories in the Daily Worker [Exs. 9 and 10].

While the defendant was in St. Louis we also have the testimony of Witness Rushmore, who, when he first met the defendant, was not a member of the Communist Party [T. R. Vol. V, 248-268]. He was very young and had been interested in Communism and had been directed to the Communist Party headquarters in St. Louis, where he met the defendant, Peter Chaunt.

Defendant Chaunt at that time introduced himself as the District Organizer to Witness Rushmore and talked

with Witness Rushmore concerning certain policies or aims of the Communist Party.

Now, what the defendant Chaunt said at that particular time will have to be taken with a grain of salt for he knew he was dealing with a young person who might be suspicious of Communism. Nevertheless, even with that in mind he said enough during the course of this conversation to indicate clearly that his attitude and his ideas were with Russia, and that he considered Russia the "fatherland" [T. R. Vol. V, 243-244].

Defendant Chaunt gave Witness Rushmore an application card for admission to the Communist Party of the United States, and later introduced him to the District Organizer of the Young Communist League and suggested that he join the Young Communist League.

In 1936 or 1938, according to the Witness Lautner, Peter Chaunt attended a national convention of the Communist Party, held in Manhattan Center on 34th Street, New York City, at which time he was head of a delegation from the Nut Pickers Union, and a delegate to the convention as was Witness Lautner [T. R. Vol. V, 298].

Exhibit 31 in evidence contains the resolutions of the Communist Party which were passed at this Tenth Convention in 1938.

In the years 1939 to 1942 the defendant was a "functionary" of the Communist Party assigned as an assistant educational director of the International Workers Order [T. R. Vol. VI, 368-389]. The record is clear as to the relationship between the International Workers Order and the Communist Party. All of the top personages in the International Workers Order were members of the Communist Party.

The Witness Lautner first came there to talk to Mr. Chaunt concerning a student whom he had sent to the defendant, Peter Chaunt.

In 1945 we find the defendant still in the Communist Party. At that time he was attending a meeting in Cleveland, Ohio, to organize a district bureau of the Communist Party of the United States [T. R. Vol. V, 331-332].

Lastly, something should be said with regard to the defendant's knowledge of the discipline of the Communist Party of the United States and its subservience to the orders and discipline of the "Comintern," meaning Communist International. The question of discipline is covered in Mr. Lautner's testimony [T. R. Vol. V, 304-314].

The importance of the part which the District Organizer played in the enforcement of discipline, as the disciplinary organization was set up from the "Comintern" down, is clearly outlined. On Exhibits 4, 5, 6 and 7, the membership books in the Communist Party signed by Peter Chaunt, is printed as "extracts from the Statutes of the Communist Party of the U.S.A." Section 3 on membership, which provides that "A member of the party can be every person from the age of 18 up who accepts the program and statutes of the Communist International and the Communist Party of the U.S.A., who becomes a member of a basic organization of the party, who is active in this organization and who subordinates himself to all decisions of the Comintern and of the Party and regularly pays his membership dues."

The membership books further recite a portion of Section 4 entitled "The Structure of the Party" and set forth as one of the principles "acceptance and carrying out of the decisions of the higher Party committees by the lower, strict Party discipline, and immediate and exact applications of the decisions of the Executive Committee of the Communist International and of the Central Committee of the Party." The membership books further contain, under a heading, "On Discipline," quotations from Lenin such as "He who weakens, no matter how little, the

iron discipline of the Party and the proletariat (especially during the period of dictatorship), effectively helps the bourgeoisie against the proletariat (Lenin).” “The Party has the best training school for workingclass leaders, is the only organization competent, in virtue of its experience and authority, to centralize the leadership of the proletarian struggle, and thus to transform all nonparty workingclass organizations into accessory organs and connecting belts linking up the Party with the workingclass as a whole (Lenin).”

How can it be said that a person who subscribes to the principles of the Communist Party as announced in the textbooks, in the Party membership books, and who participated at a high level in the activity of that Party in this country, not only in its promotional efforts in this country but in its disciplinary efforts as controlled and directed by the Communist International with its headquarters in Moscow, Russia, is a person who at one and the same time could truthfully aver his undivided allegiance to the United States of America? How can it be said that such a person was “attached” to the principles of the Constitution of the United States, so clearly in direct conflict with the principles of the constitution of the Communist Party of the United States and of the Communist International?

The evidence on this point is reasonable, substantial and probative.

II.

The Evidence Is Clear, Unequivocal and Convincing That Appellant Intentionally Concealed From the Immigration Service Three Prior Valid Arrests and That He Was an Active Member and Officer of the Communist Party, and the Judgment of Denaturalization Should Be Sustained on Either Ground.

- A. Invalidity of the Arrests Concealed by the Defendant Was Not Alleged as a Defense in the Answer of the Defendant, No Evidence With Regard to the Question Was Offered, Defendant Did Not Testify Regarding That Matter, or Any Other, and the Question Was Not Raised Either Orally or by Memorandum: Appellant Is Therefore Precluded From Raising This Point on Appeal. In Any Event, the Arrests Which Were Concealed by the Defendant, According to the Findings of the District Court, Were Valid Arrests as a Matter of Law.
- B. If It Is Necessary to Make a Finding That the Arrests Which Were Concealed Were Valid (Which We Think It Is Not), the Finding of "Concealment of Arrests" Connotes Valid Arrests and Is Sufficient.

Count One of the Second Amended Complaint alleges concealment of three different matters: Item (1) That he was an active member and officer of the Communist Party of the United States; and item (2) relating to concealment of arrests and charges of which four are listed as concealed, (a), (b), (c) and (d). In the Findings the concealment of only three arrests is found, the fourth, being item (d) and referring to the same offense as item (c), which was alleged to be committed on or about March 11, 1930.

The testimony of Calvin Derringer [T. R. 8-100], the Immigration Examiner who examined appellant on his Petition for Naturalization, relates principally to Govern-

ment's Exhibits 2A and 2B, the Preliminary Form for Petition for Naturalization, and Government's Exhibits 2F and 2G, the triplicate copy of the Petition for Naturalization (Appendices "A" and "B" of this brief).

It is Exhibit 2A and 2B which contains Question 30, "Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic regulation?", to which appellant gave both the written and the oral answer, "No" [T. R. 39-40]. Exhibit 2G, the reverse side of the triplicate Petition, contains the notations made by Mr. Derringer, with regard to the questions which he orally asked the appellant while under oath, indicating that he again answered "No" to the arrest question, and with regard to the question as to organizations, that he said he belonged to the "Fraternal Benefit Society of International Workers Order where applicant is employed—no others" [T. R. 33-34]. It was Mr. Derringer's testimony that during this oral examination he also asked him, as found in the Findings and Judgment of the court, "whether he believed in Nazism, Communism or Fascism" and that the appellant answered "No" [T. R. 22].

The question of the validity of the arrests, or the necessity of a finding of concealment of a "valid" arrest, was not raised in the court below, and it is the general rule that the appeal is restricted to such questions and issues as were made and considered below and there decided, because the trial court cannot be guilty of any error in a ruling it has never made upon an issue to which its attention has never been called (see *Delgadillo v. Carmichael*, 332 U. S. 388, reversing 159 F. 2d 130, and *McComb v. Goldblatt Bros.*, 166 F. 2d 387). While there may be some exceptions to this general rule, under all of the circumstances this does not appear to be a case where an exception should be made. The mere citation in the District Court of the *Kessler* case does not raise the issue.

In any event, we think the point is not well taken, and the case of *United States v. Kessler* (C. A. 3), 213 F. 2d 53, strongly relied on by the appellant, is distinguishable from the present case in so many respects that it is of little value on the point. And in addition, the subsequent case of *United States v. Corrado*, 121 Fed. Supp. 75, 227 F. 2d 780, cert. den., 351 U. S. 925, clearly is contrary to Footnote 9 at page 58 of the *Kessler* decision.² Further, the *Corrado* case confirms the validity of denaturalization for failure to disclose membership in the Communist Party, as well as failure to disclose arrests. And the recent decision of this Court in *Stacher v. United States*, 258 F. 2d 112, cert. den., 358 U. S. 907, is in accord with the *Corrado* decision and was a case in which there was no finding of validity or invalidity of the arrests concealed, which were relied upon as the basis for the denaturalization.

In the *Kessler* case, as distinguished from the instant case, the defense of illegality of the arrests was asserted in the answer to the complaint, which answer admitted the arrests but denied the fraud. The defendant Kessler took the stand and testified at length that she had no intention of lying with regard to her understanding as to what was wanted by the question of the Immigration Examiner. The defendant there, while engaging in picketing during a labor dispute, had been arrested 17 times on charges of "obstructing the highway," had been brought before a magistrate each time and each time discharged. Her failure to reveal any of these arrests when questioned during her naturalization examination led to the institution of denaturalization proceedings. At the trial, she took the

²Footnote 9 in the *Kessler* case reads as follows: "We have found no decision and none has been cited to us where citizenship has been revoked for failure to disclose facts the revelation of which would have not justified refusal of citizenship in the first place. . . ."

witness stand and testified as to why she had given a negative answer to the question concerning arrests: The attorney for her union had told her on numerous occasions following her discharge that the arrests were illegal and that she had committed no crime cognizable at law. She testified it was her understanding she had committed no crime, had done nothing wrong; she had no intention of lying but did not understand the purport of the question at the time she answered it.

The Third Circuit's judgment in *Kessler* is therefore sustainable on the ground that the District Court's finding of wilful concealment is clearly erroneous on that record. The defendant, Chaunt, on the other hand, never took the stand to explain why he failed to disclose his arrests and upon being called by the Government, declined to answer any questions on the grounds of self incrimination. There is, therefore, nothing in the instant record on which to challenge the District Court's finding that Chaunt's concealment of his arrests was knowing and wilful. Assuming, *arguendo*, that the proposition that the applicant for naturalization is under no duty to disclose "false" arrests, once the Government has shown that the defendant has concealed an arrest, the burden should be on the defendant, to show by way of affirmative defense that the arrests were illegal. [See Exs. 1A to 1E for the Court's records on these arrests.]

In the *Corrado* case (C. A. 6, Dec. 16, 1955), Corrado, like Kessler, testified in his own behalf in an attempt to explain why he had not revealed the previous arrests. The testimony of the preliminary examiner who questioned Corrado was reflected in notations similar to the notations on the back of the triplicate copy of the petition in this instance. The court, in discussing the case, says, at pages 782 and 784:

"The brunt of appellant's complaints on this appeal is that, unless the Government denied citizenship

on the unproven charges made in the warrants of arrest, his citizenship should not be canceled now for his deception in the statement that he had never been arrested, especially in view of the fact that his only convictions were for misdemeanors, or minor offenses. He throws in the proposition that fraudulent procurement of naturalization must be established by clear and convincing evidence, which, he says, has not been done in this case. *Baumgartner v. United States*, 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525; *Schneiderman v. United States*, 320 U. S. 118, 125, 63 S. Ct. 1333, 87 L. Ed. 1796; *Knauer v. United States*, 328 U. S. 654, 66 S. Ct. 1304, 90 L. ed. 1500. Appellant stresses as authority *United States v. Kessler*, 3 Cir., 213 F. 2d 53, wherein it was held that an applicant's denial in her petition for naturalization that she had ever been arrested was not ground for cancellation of her naturalization certificate, where the Government stated that she had been arrested 17 times. The facts were, however, that all seventeen of her arrests had been illegal and invalid, inasmuch as the activity for which she was arrested consisted merely of peaceful picketing. She stated that she had answered 'no' to the question concerning her arrests for the reason that she had committed no crime, had done nothing wrong, had no intention of lying; and that she did not understand the purport of the question at the time she answered it. . . .

* * * * *

"Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship.

How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.

“In three denaturalization proceedings, heard together on appeal to this court from the Eastern District of Michigan, we affirmed the respective judgments of District Judges Levin, Thornton and Picard: all revoking naturalization. *Sweet v. United States* (*Chomiak v. United States*, and *Charnawola v. United States*), 6 Cir., 211 F. 2d 118, 119. In the *Sweet* case, Judge Levin said that the ‘*testimony left no doubt that the defendant had concealed his history of Communist Party membership from the naturalization authorities and had thereby thwarted inquiry into his eligibility for naturalization.*’ In the *Chomiak* case, Judge Thornton found convincing evidence that the denaturalized defendant had been a member of the Communist Party and, therefore, ineligible for citizenship; and that the defendant had procured his naturalization illegally. In the *Charnowola* case,

Judge Picard found that the defendant in naturalization proceedings had not truthfully answered the question asked by the examiner as to whether he had ever been a Communist and, therefore, had obtained citizenship by fraud. This court stated in its per curiam opinion that the findings of fact of the judge in each of the cases were supported by substantial evidence and were certainly not clearly erroneous; and that the conclusions of law in each case were based upon logically correct reasoning, supported by highest authority. (Emphasis added.)

“In *United States ex rel. Volpe v. Smith*, 7 Cir., 62 F. 2d 808, 812, which habeas corpus was denied in a deportation proceeding, Judge Evan Evans said: ‘What the officer would have discovered, or might have discovered, had the inspection not been thwarted is beside the question. The inspection contemplated was defeated. In legal effect there was no inspection.’ The same reasoning applies here.

“In *Stevens v. United States*, 7 Cir., 190 F. 2d 880, 881, Chief Judge Major said: ‘We have no doubt but that a false statement knowingly made by an applicant for naturalization in the course of such proceeding would afford a proper basis for denying the application, and it is immaterial that the false statement knowingly made concerned violations which occurred previous to the five-year period.’ Cf. *United States v. Etheridge*, D. C. Or., 41 F. 2d 762.”

Moreover, we question the validity of the *Kessler* decision’s thesis that the naturalization questionnaire contemplated only “legal” arrests. Analysis of the motivation behind such inquiries discloses a much broader Governmental interest. The naturalization statutes since the earliest days of our Republic have prescribed certain qualita-

tive prerequisites to citizenship, including, among others, that the applicant show himself to have behaved as a person of good moral character, attached to the principles of our Constitution, well disposed to the good order and happiness of the United States, etc. It is largely from the examination of the applicant himself that a determination can be made whether he meets the statutory standards. In such an examination, the United States is entitled to frank, honest and unequivocal information from the applicant (*United States v. Genovese*, 133 Fed. Supp. 820 (D. N. J., 1955), *affd.* 236 F. 2d 757 (C. A. 3, 1956), *cert. den.*, 352 U. S. 952).

The naturalization statutes before the Immigration and Nationality Act of 1952 did not forbid naturalization because of conviction of crime³ In fact, they made no mention of arrests or convictions. Yet, these items have been inquired into since the earliest times and such inquiries have been specifically commanded by regulation since 1929. The purpose of such interrogation is not served merely by ascertaining whether the applicant has an arrest record, for the presence or absence of such a record is not dispositive on the statutory qualifications. A person convicted of crime may still be able to meet the prescribed standards of good moral character. On the other hand, a person who has never been arrested may nevertheless fail to live up to the required moral standards. In determining whether the applicant measures up, his *conduct* is the crucial factor. The questions as to arrests, convictions, etc., have relevance

³Under Section 101(f) of the 1952 Act, certain convictions now preclude a showing of good moral character.

only insofar as the answers will shed light on the applicant's conduct, or will suggest further lines of inquiry.

Thus, for example, the fact that an applicant has been acquitted on a criminal charge does not make the fact of his arrest irrelevant; it may still be appropriate to inquire into the conduct which led to the arrest. The acquittal may have been due to various reasons. The arrest may have been for conduct which did not constitute a crime; or the evidence may not have been sufficient to establish guilt beyond a reasonable doubt. The defendant may have bribed or intimidated the witnesses against him. The acquittal may preclude further prosecution on the same charge, but it is not *res judicata* in a later civil proceeding. Thus, when a naturalization applicant discloses he has been arrested for allegedly violating a law, a new avenue of inquiry is opened up for the naturalization examiner. And when the applicant fails to disclose that he has been charged with law violations, he blocks lines of inquiry which might yield pertinent facts regarding his moral character.

It cannot be said that the question concerning arrests was designed to reveal only those which subsequently turned out to be "lawful." It is more likely that it was intended to extract from the applicant information concerning all law violations he had been charged with, information which would be useful to the naturalization examiner in determining whether, and to what extent, further investigation was required. As Mr. Derringer's testimony discloses, this was actually the basis upon which the Immigration Service used the information, if disclosed.

The validity of the arrests may be relevant in a situation such as in *Kessler*, where the applicant had been acquitted, had been told repeatedly the arrests were not legal and had honestly thought that this information was not contemplated by the question. This is a far cry from the *Chaunt* situation, where there was at least one conviction, where there was no showing that the applicant believed the arrests illegal and failed to disclose them solely because he thought the question did not encompass them.

The District Court found as fact that Chaunt intentionally concealed the arrests. Assuming, without conceding, the invalidity of the charges, we do not believe that an applicant who has intentionally concealed his criminal record is relieved of the consequences of his fraud by the mere circumstance that it later turns out (unknown to him) that the arrests were unlawful. Quite the contrary, the cases all hold that the intentional misstatement of facts properly inquired into warrants the denial of naturalization, even though the truth itself, if revealed, would not have required denial. The materiality of the concealment lies in the fact that it blocks further inquiry, not necessarily on a showing that further investigation would have yielded adversely effective material (see *Del Guercio v. Pupko*, 160 F. 2d 799 (C. A. 9, 1947); *United States v. Lumantes*, 139 Fed. Supp. 574 (N. D. Cal., 1955), affd. 232 F. 2d 216 (C. A. 9, 1956); *Corrado v. United States*, 227 F. 2d 780 (C. A. 6, 1955), cert. den., 351 U. S. 925; *United States v. Genovese*, 133 Fed. Supp. 820 (D. N. J., 1955), affd. 236 F. 2d 757 (C. A. 3, 1956), cert. den., 352 U. S. 952).

III.

No Supreme Court Case Has Ever Held That a Naturalization Judgment Is Res Judicata and This Defense Is Not Available Regardless of Whether the Grounds for Denaturalization Are Lack of an Essential Qualification for Naturalization or That the Naturalization Was Obtained by Concealment or Misrepresentation.

In raising the question of *res judicata* of the naturalization decree, appellant makes a distinction between those cases where an essential requirement for naturalization is lacking and the court therefore lacked jurisdiction to naturalize, and a case where there was a concealment or misrepresentation as to a material fact which might not of itself have been an essential requirement for naturalization under the statutes.

We think it is immaterial in which category the case rests. It is clear that the Government has the right to denaturalize. This argument is also developed in some detail under Point II of this brief.

Nor is there any validity to the distinction which appellant makes (App. Br. 13) that under the new Section 340 "the Naturalization decree is vulnerable to attack upon fraud grounds only for what has traditionally been known as extrinsic fraud, and not for any misstatement occurring in the proceeding itself."

A clearer analysis of the matter is contained in Judge Yankwich's decision in *United States v. San Title*, 132 Fed. Supp. 185, a case similar in its grounds of denaturalization to the present one, and having analogous evidentiary matters.

The more important distinction is between (1) the naturalization granted as an *ex parte* application, where the Immigration Service recommends naturalization and the court grants it without any adversary court proceeding,

or the presentation of evidence by either side, and (2) the case where the Immigration Service recommends against granting naturalization and appears before the court and makes a showing in opposition to the denaturalization and on a contested hearing where both sides present evidence and argument and the court decides the matter. In the latter instance, it could better be argued, a contested issue of fact fully explored in the evidence by both sides might upon the finding of the court become *res judicata*. That is not the case here.

As to misrepresentation as to "attachment and allegiance" to the Constitution, as set forth by the outline of the oath in the petition for naturalization and as contained in the oath taken before the court at the time of naturalization, and as to the question of good moral character, we have two elements which under the statute, *supra*, are essential requirements before the court has jurisdiction to grant the naturalization. Appellant's brief appears to concede that as to such grounds the defense of *res judicata* does not apply.

In addition, in the present case, denaturalization is sought on the grounds of concealment of arrests and concealment of membership in the Communist Party, and misrepresentation as to these two items, neither of which is essential to qualify for naturalization, but both of which, if concealed, result in concealment of material facts which as a result prevent the Immigration Service from discovering matters which might result in a recommendation against naturalization. As we understand appellant's argument then, it is that as to these latter two grounds for denaturalization, as contained in the First Cause of Action for concealment and in the Second Cause of Action for misrepresentation, the appellant contends that those items were made *res judicata* by the naturalization decree. And appellant's brief (App. Br. 12) seems to infer that there

were issues here which were “actually litigated or subject to litigation.”

It is clear from the testimony of Calvin Derringer, the Immigration Examiner in this case, that the failure to disclose prior arrests and membership and officership in the Communist Party left the record before the Immigration Service in such a state that there was nothing on its face to require any further investigation [T. R. 65, 66, 82, 97], and the recommendation to grant naturalization was made without knowledge of these facts. There was therefore no contested hearing before the naturalization court on either of these questions, and, in fact, no issue was ever raised as to them, and there was therefore no finding on either question by the naturalizing court which could remotely be reconsidered *res judicata*. None of the cases cited by appellant so holds.

An extensive memorandum on this point was presented to the District Court, and for the convenience of this Court we here set out, in chronological order of their decisions, the Supreme Court cases decided before *United States v. Bridges*, 346 U. S. 209, the lower court cases decided after the *Maney* case, and the important cases subsequent to the *Bridges* case, and thereafter analyze them.

SUPREME COURT CASES BEFORE UNITED STATES V. BRIDGES:

Johannessen v. United States, 225 U. S. 227 (1912);

Luria v. United States, 231 U. S. 9 (1913);

United States v. Ness, 245 U. S. 319 (1917);

United States v. Ginsberg, 243 U. S. 472 (1917);

Tutun v. United States, 270 U. S. 568 (1926);

Maney v. United States, 278 U. S. 17 (1928);

Schneiderman v. United States, 320 U. S. 118 (1943);

Baumgartner v. United States, 322 U. S. 665 (1944);

Knauer v. United States, 328 U. S. 654 (1946).

LOWER COURT CASES PRIOR TO MANEY V. UNITED STATES:

United States v. Mulvey, 232 Fed. 513 (C. A. 2, 1916);

United States v. Leles, 236 Fed. 784 (D. C., N. D. Cal., 1916);

United States v. Ovens, 13 F. 2d 376 (C. A. 4, 1926);

United States v. Pandit, 15 F. 2d 285 (C. A. 9, 1926);

United States v. Gokhale, 26 F. 2d 360 (C. A. 2, 1928);

United States v. Richmond, 17 F. 2d 28 (C. A. 3, 1927);

United States v. Srednik, 19 F. 2d 71 (C. A. 3, 1927);

United States v. Ali, 20 F. 2d 998 (E. D. Mich., 1927).

LOWER COURT CASES AFTER MANEY:

Turlej v. United States, 31 F. 2d 696 (C. A. 8, 1929);

United States v. Bischof, 48 F. 2d 538 (C. A. 2, 1931);

Sourino v. United States, 86 F. 2d 209, 300 U. S. 661 (C. A. 5, 1936);

United States v. Anger, 26 F. 2d 114 (D. C., S. D. N. Y., 1928);

United States v. Parisi, 24 Fed. Supp. 414 (Md., 1938);

United States v. Konevitch, 67 Fed. Supp. 215 (D. C., M. D. Pa., 1946).

BRIDGES CRIMINAL CASE AND SUBSEQUENT CASES:

United States v. Bridges, 346 U. S. 209;

United States v. Sweet and Charnowola, 106 Fed. Supp. 634 (E. D. Mich., 1952), 109 Fed. Supp. 810 (E. D. Mich., 1953), both *affd.*, 211 F. 2d 118 (C. A. 6, 1954), *cert. den.*, 348 U. S. 817;

Accardo v. United States, 208 F. 2d 632, 113 Fed. Supp. 783, *cert. den.* (Oct. Term, 1953—No. 614);

United States v. Lurtig, 110 Fed. Supp. 806 (S. D. N. Y., 1953);

United States v. Cufari, 120 Fed. Supp. 941, 217 F. 2d 404 (D. C. Mass., 1954);

Stacher v. United States, 258 F. 2d 112, *cert. den.*, 358 U. S. 907.

OTHER CASES SINCE 1954 WHICH HAVE CONSIDERED THE QUESTION OF RES JUDICATA ARE:

United States v. Jerome, 115 Fed. Supp. 818 (S. D. N. Y., 1953);

United States v. Candela, 131 Fed. Supp. 249 (S. D. N. Y., 1954);

United States v. Bridges, 123 Fed. Supp. 705 (N. D. Cal., 1954);

United States v. Fisher, 137 Fed. Supp. 519 (N. D. Ill., 1955), reversed on other grounds, 258 F. 2d 362 (C. A. 7, 1958);

United States v. De Lucia, 256 F. 2d 487 (C. A. 7, 1958), *cert. den.*, 358 U. S. 836;

United States v. Chandler, 132 Fed. Supp. 650 (D. Md., 1955);

United States v. Polites, 127 Fed. Supp. 768 (E. D. Mich., 1953).

The Basic Statute.

A statutory basis for the revocation of naturalization on the ground of illegal or fraudulent procurement was first provided in Section 15, Act of June 29, 1906 (34 Stat. 601), which made it the duty of the United States Attorneys, upon affidavit showing good cause therefor, to institute judicial proceedings in any court having jurisdiction to naturalize aliens, for the purpose of setting aside and cancelling a certificate of citizenship on the ground of fraudulent or illegal procurement. The provisions of Section 15 were carried over without material change to the Nationality Act of 1940 (8 U. S. C. (1946 Ed.) 738). Section 11 of the 1906 Act, also carried over into the 1940 Act (*Op. Cit.*, Sec. 734), authorized the United States to appear in opposition to the naturalization of any alien. Similar provisions are contained in 8 U. S. C., Secs. 1451 and 1447(d) of the 1952 Act.

Cases Preceding Supreme Court Decision in Bridges' Criminal Case.

A. Supreme Court Cases.

The application of the doctrine of *res judicata* in a cancellation case was first discussed in the Supreme Court in *Johannessen v. United States*, 225 U. S. 227 (1912). There, the Court had under consideration an action under Section 15 to cancel a certificate of naturalization, granted by a State court long prior to the adoption of the 1906 Act, on the ground that the certificate was fraudulently and illegally procured in that the certificate was based on the perjured testimony of two witnesses that Johannessen had resided in the United States for the period prescribed by statute as a condition to naturalization. The court stated (pp. 238-239) that the foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court;

that *uncontested naturalization proceedings were in the nature of ex parte proceedings*; and that grants of naturalization were like public grants, which may be revoked for fraud. The Court, therefore, refused to accord the State Court judgment conclusive effect.⁴ The opinion expressly left undecided the question whether the contest by the Government under Section 11 of a naturalization would render the naturalization judgment immune from later attack under Section 15 on the ground that the naturalization was illegally procured.

The question was answered in the negative in *United States v. Ness*, 245 U. S. 319 (Nov., 1917). In this case, the Government prayed for the cancellation of a naturalization certificate on the ground that it had been illegally procured because Ness had not filed a certificate of arrival with his petition for naturalization as required by law. The United States, through a chief naturalization examiner, had appeared in opposition to the grant of naturalization and had filed a motion that the naturalization petition be dismissed on the ground of the failure to file the certificate of arrival. Although Ness admitted in the cancellation action his failure to file the certificate, he contended that the issue was *res judicata*. The Court, speaking through Mr. Justice Brandeis, rejected the contention, stating (p. 325, *et seq.*):

The remedy afforded by §15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, *United States v. Throckmorton*, 98 U. S. 61; *Kibbe v. Benson*, 17 Wall. 624; but it is

⁴The *Johannessen* case was affirmed in *Luria v. United States*, 231 U. S. 9 (1913), and *United States v. Ginsberg*, 243 U. S. 472 (1917). In *Ginsberg*, the Court, after a mere reference to *Johannessen*, set aside a naturalization, which had been granted in chambers, on the ground that the applicable statute required the hearing to be in open court.

narrower in scope than the protection offered under §11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under §11. For Congress did not see fit to provide for a direct review by writ of error or appeal. But where fraud or illegality is charged, the Act affords, under §15, a remedy by an independent suit "in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit." If this suit is brought in the federal District Court, its decision will also be subject, under the general law, to review by the Circuit Court of Appeals, and, on certiorari, by this court. Such an independent suit necessarily involves considerable delay and expense; and it may subject the individual to great hardship. On the other hand, a contest in the court naturalization is usually disposed of expeditiously and with little expense. The interest of all concerned is advanced by encouraging the presentation of known objections to naturalization at the earliest possible stage of the proceedings; so that the petitioner may, if the defects are remediable, remove them, and if not, may adopt, without delay, such course, if any, as will ultimately entitle him to citizenship. It would have defeated this purpose to compel the United States to refrain from presenting any objection, or the objection of illegality, in the court of naturalization, unless it is willing to accept the decision of that court as final.

It was the purpose of Congress, by providing for appearances under §11, to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under §15. In most cases this assistance could be given best by an experienced examiner of the Bureau of Naturalization familiar with the sources of information. Section 11, unlike §15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under §11 on behalf of the Government should be held to create an estoppel, no good reason appears why it should not arise, equally whether the appearance is by the duly authorized examiner or by the United States attorney. But in our opinion §11 and §15 were designed to afford cumulative protection against fraudulent or illegal naturalization. The decision of the Circuit Court of Appeals is therefore *reversed*.

It was not until *Tutun v. United States*, 270 U. S. 568, 578-580 (1926) that the Supreme Court decided that a right of appeal lay from a judgment of a district court in a naturalization proceeding. Previously there had been a split among the circuits on the point. That the *Tatum* decision did not require the adoption of a different rule that the Court had previously announced on the *res judicata* point was made apparent by *Maney v. United States*, 278 U. S. 17 (Oct., 1928). There, the question was whether a naturalization was illegally procured in that the certificate of arrival was not filed with the petition for naturalization even though the naturalization court issued a *nunc pro tunc* order that the certificate be filed as of the date of the filing of the petition. The grant of the petition had been formally opposed by the Government.

The Court held that the order was invalid. In the course of the opinion, Mr. Justice Holmes stated (pp. 22-23):

“We are of the opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the court. Although the proceedings for admission are not judicial, *Tatum v. United States*, 270 U. S. 568, they are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist. Hence not only the conditions attached to the grant, but those attached to the power of the instrument used by the United States to make the grant must be complied with strictly, as in other instances of Government gifts. By §4 of the Act an alien may be admitted to become a citizen of the United States in the manner prescribed, ‘and not otherwise.’ And by the same section the certificate from the Department of Labor is to be filed ‘at the time of filing the petition.’ (C., §§372, 379.) The form provided by §27 (C., §409) alleges that the certificate is attached to and made a part of the petition. The Regulations of the Secretary of Labor embodied our interpretation of the law, and would have warned the petitioner if she had consulted them. Rule 5, Ed. February 15, 1917; Ed. September 24, 1920. *United States v. Ness*, 245 U. S. 319, 323. It already has been decided that the filing of the certificate is an essential prerequisite to a valid order of naturalization, *United States v. Ness, supra*, and that a hearing in chambers adjoining the Courtroom does not satisfy the requirement of a hearing in open Court. *United States v. Ginsberg*, 243 U. S. 472.

“As the certificate of citizenship was illegally obtained, the express words of §15 authorize this pro-

ceeding to have it cancelled. The judgment attached did not make the matter *res judicata*, as against the statutory provisions for review. The difference between this and ordinary cases already has been pointed out and would be enough to warrant a special treatment to say that a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had."

Until *Schneiderman v. United States*, 320 U. S. 118 (1943), the Government had prevailed in every denaturalization case that reached the Supreme Court. There the Court reversed the trend. For present purposes, however, that case is important only for what it did not decide. The Court assumed that a naturalization decree could be reexamined on a charge that it was illegally procured because the finding of attachment to the Constitution was erroneous. It assumed also that the denaturalization statute was constitutional. The majority did not attach any significance to the fact of appearance or lack of it by the Government in the naturalization proceedings. After pointing out that under Section 11 of the 1906 Act the United States had the right to appear, to cross-examine, to introduce evidence and to oppose the petition, the Court said (p. 123):

"The record before us does not reveal the circumstances under which the petitioner was naturalized except that it took place in open court. We do not know whether or not the Government exercised its right to appear and appeal. *Whether it did or not, the hard fact remains that we are here re-examining a judgment, and the rights solemnly conferred under it.*" (Emphasis ours.)

The Court seemingly questioned (p. 124, fn. 3) the analogy drawn in the *Johannessen* case between a naturalization decree and a public grant of land or of letters patent—"the permissible area of re-examination is different in the two situations." The Court also seemed to question the power of Congress to re-examine naturalization decrees except for extrinsic or collateral fraud. Mr. Justice Douglas, in a concurring opinion, relied principally on the rather tenuous assumption that the statute had made the finding of the naturalization court the criterion and that in the absence of fraud the finding of attachment could not be disturbed. Mr. Justice Rutledge also questioned the power to attack naturalization judgments. The dissenting opinion of Chief Justice Stone charged that the Court had not followed its prior decisions.

In *Baumgartner v. United States*, 322 U. S. 665 (1944), the Court had under review a judgment affirming a district court order sustaining a petition for cancellation of a naturalization on the grounds of fraud and illegality in that Baumgartner did not intend fully to renounce his allegiance to Germany and did not intend to support the Constitution and Laws of the United States. There, Baumgartner argued (Br. p. 39) that a naturalization decree could be set aside only on the ground of extrinsic fraud or errors on the face of the record. In the majority opinion, Mr. Justice Frankfurter said (p. 672) that "even if objective falsity as against perjurious falsity of the oath is to be deemed sufficient under §338(a) of the Nationality Act of 1940 to revoke an admission to citizenship, it is our view that the evidence does not measure up to the standard of proof which must be applied to this case." But the Justice went on to say (p. 675) that "No doubt the statutory procedure for naturalization (§334, Nationality Act of 1940), and §338, with which we are here concerned, 'were designed to afford cumulative protection against fraudulent or illegal naturalization.'"

The last case in which a majority of the Supreme Court issued an opinion on the *res judicata* point is *Knauer v. United States*, 328 U. S. 654, where the Court sustained a judgment cancelling Knauer's naturalization on the grounds that he was not attached to the principles of the Constitution and that he had taken a false oath of allegiance. The Court said (pp. 670-671):

“* * * We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. * * * [T]he issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated.”

B. Lower Court Cases.

1. Prior to *United States v. Maney*, 278 U. S. 17 (1928).

In *United States v. Mulvey*, 232 Fed. 513 (C. C. A. 2, 1916), the claim was made that, as the Government was given by Section 11 of the Naturalization Act the right to appear in Naturalization Proceedings and to be heard in opposition, it is bound by the order of the court in granting naturalization, unless it sues out a writ of error. No writ was obtained. Instead the Government filed a petition in the District Court asking for the cancellation of the certificate. The petition was dismissed, an appeal was taken and the Court reversed with instructions to issue an order of cancellation. The Circuit Court of Appeals held that a naturalization proceeding is not adversary in its nature, citing *Johannessen v. United States*, 225 U. S. 227. It also held that the appearance of a representative of the Bureau of Naturalization before the District Court when the application for citizenship

was granted was an *amicus curiae* to present to the court such facts relative to the personal history of applicants as the Bureau's investigations may have disclosed. The Court also stated (p. 518): "The order admitting the respondent to citizenship recites no appearance by the Government on the hearing, no minutes of the testimony were taken, and no record preserved. Under such circumstances we do not think that the appearance of a representative of the Bureau . . . is to be regarded as an appearance by the United States . . . The United States, therefore, is not so bound by the decree that it is not entitled to proceed by petition to cancel the certificate so used." In a dissent one judge pointed out that Section 15 authorized suits only for fraud and illegality and not for the correction of error. He would have affirmed on the ground that while there may have been an erroneous grant it was not illegal. Further he found that the United States was represented at the hearing and then and there objected to the granting of citizenship. In *United States v. Ness, supra* (245 U. S. 219, 327, fn. 1), the Supreme Court referred to the *Mulvey* case and said that in view of the language of Section 11 ("The United States shall have the right to appear . . .") the facts that the Bureau representative was not a law officer of the Government was not of importance.

In *United States v. Owens*, 13 F. 2d 376 (C. C. A. 4, 1926), the Government did not appeal from an order refusing to cancel a certificate of naturalization but proceeded under Section 15 to set aside the certificate on the ground of illegal procurement. The District Court dismissed the suit on the theory that the United States was estopped by the judgment of the State Court admitting defendant to citizenship. In reversing the Court held that that Section 15 provided a new remedy which is in some respects broader than the protection afforded the United States by Section 11. The Court also specifically referred to *Tutun v. United States, supra*, which first

authoritatively upheld the existence of appellate jurisdiction in naturalization cases.

In *United States v. Pandit*, 15 F. 2d 285 (C. C. A. 9, 1926), the United States sought cancellation under Section 15 of a naturalization of a Hindu on the ground that he was racially ineligible. The Ninth Circuit held that a naturalization examiner's objection to the grant of citizenship on that ground rendered the issue *res judicata*. Although certiorari was denied (273 U. S. 759), the decision is highly questionable as a precedent since it made no reference to *Ness*; the dissenting circuit judge in *Maney* relied on it (*Pandit*) 21 F. 2d 28, 29; and it was unsuccessfully argued in the Supreme Court in opposition to the position the court ultimately adopted there.

Moreover, the Circuit Court of Appeals for the Second Circuit in *United States v. Gokhale*, 26 F. 2d 360 (1928), found no merit in the *Pandit* decision. In the *Gokhale* case the Court assumed that the United States had in fact the opportunity to appear in opposition and was represented although apparently no issue of fact was raised. Relying on *United States v. Ginsberg*, *supra*, fn. 1, and the *Ness* case, *supra*, the Court held that when a necessary prerequisite to naturalization was missing (*Gokhale* was a Hindu), a bill under Section 15 would lie as a cumulative remedy.

*Tutun v. United States, supra.*⁵

⁵Certiorari was granted in the *Gokhale* case, 278 U. S. 591, and the cause was later remanded with directions to dismiss the complaint pursuant to stipulation and on motion of the Solicitor General, 278 U. S. 622. The reasons do not appear. In connection with the Hindu cases see *United States v. Thind*, 261 U. S. 204, which held, in 1922, that a high-caste Hindu could not become a citizen of the United States.

In *United States v. Richmond*, 17 F. 2d 28 (C. C. A. 8, 1927) the Government did not appeal from an order granting a certificate of naturalization but instead instituted an independent proceeding to cancel the certificate under Section 15. There were no after discovered facts.

The primary question involved was whether the certificate was "illegally procured" and the Court concluded that it was not, within the meaning of Section 15, but was an irregularity in procedure, correctable on appeal, emphasizing that the Government was present at the naturalization hearing. This conclusion was affirmed by the Third Circuit in *United States v. Srednik*, 19 F. 2d 71, (1927). These cases adopt the reasoning that to the words "procured" and "illegally procured," coupled in Section 15 with fraud, must be attributed the purpose of Congress "to use evidencing a positive, affirmative act on the part of the procurer, and one of a sinister character."⁶ These cases, like *Pandit*, are doubtful precedents since they were urged and apparently rejected in the Supreme Court in *Maney*.

United States v. Leles, 236 Fed. 784 (D. C. N. D. Calif., 1916), involved a proceeding under Section 15 to cancel a certificate of naturalization both on the ground of fraud in its procurement, in that the defendant was not at the time of good moral character, and that it was illegally granted for failure to follow the proper method of proof. An agent of the Naturalization Bureau was present at the hearing and participated in the interrogation of witnesses and the contention was made that the proceed-

⁶In the *Richmond* case the only irregularity involved was that the judge left the courtroom while the applicant and his witnesses made their proof before the clerk. It is simple, therefore, to square this decision with the *Ness* doctrine. In *Srednik* the alleged defect was that the applicant had not resided in the United States during the statutory period required.

ings were thus made adversary, *res judicata* applying. The Court held, however, that the Government was not estopped by the judgment granting the certificate. At page 788 the court said:

“But it urged that in the *Johannessen* case the certificate was issued under the old statute,⁷ and the Court expressly refrained from determining whether the present Act, of which this is one, are to be regarded as equally of an *ex parte* character as those under the old, where the proceeding was had without notice to the Government. The reasoning in that case, however, would seem to land countenance to the contention of the Government that the mere appearance at the hearing of the agent of the Naturalization Bureau to interrogate the witnesses, without filing any pleading making specific objection to the granting of a certificate or putting in issue any of the averments of the petition, cannot have the effect of converting the proceeding from an *ex parte* to an adversary one, in a sense to make the doctrine of *res judicata* apply.

* * * * *

“Within this definition⁸ the presence of an agent of the Bureau of Naturalization, a mere administrative officer, should not be regarded as an ‘appearance’ for the purpose of litigating the matter in a sense to make it an adversary proceeding. The agent

⁷Prior to the Act of June 29, 1906, there was no comparable provision to Section 15.

⁸In *Johannessen* the court at page 238 held that “the foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. . . . The general principle was clearly expressed . . . in *Southern Pacific v. United States*, 168 U. S. 1, 48 . . . ‘that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.’ ”

is present, and is usually as in this instance, permitted to interrogate the applicant and his witnesses; but aside from this, the proceeding is no more in its nature an adversary one or less *ex parte* than under the old Act. The Government is not present as an adversary, but simply for the purpose of supervision of the proceedings through the medium of its Naturalization Bureau. What the effect would be of a formal appearance by the law officers of the Government, putting in issue the averments of the petition and calling adverse witnesses in support thereof, need not be determined.”⁹

United States v. Ali, 20 F. 2d 998 (E. D. Mich., 1927), is important particularly because it refused to follow *United States v. Pandit*, *supra*. There the Court, in another Hindu case, ruled squarely that a previous decision of the Court granting a certificate is not, although rendered in a legal proceeding between the same parties, *res judicata*, citing the *Ness* case and mentioning that *Pandit* had not taken that decision into consideration.¹⁰

2. Lower Court Decisions after *United States v. Maney*, 278 U. S. 17 (1928).

The bill of complaint in *Turlej v. United States*, 31 F. 2d 696 (C. C. A. 8, 1929), sought cancellation on the sole ground of fraud including fraud in the oath.¹¹ The

⁹Accord: *United States v. Albertini*, 206 Fed. 133 (D. Mont., 1913).

¹⁰The opinion in the *Ali* case does not indicate whether the Government appeared in the naturalization court. See also *United States v. Ali*, 7 F. 2d 728, holding that an order admitting the defendant to citizenship was not *res judicata*.

¹¹The complaint seeking revocation alleged prior convictions which the defendant admitted at the time of the naturalization hearing.

defense was *res judicata*. It also appears that a Naturalization Examiner challenged Turlej's qualifications at the time the certificate was granted. The lower court cancelled the certificate and the judgment was affirmed. The Circuit Court of Appeals remarked that "neither can the contention be sustained that his admission to citizenship, with the facts of his previous infraction of the law before the Court, is such an adjudication as to bar review. The decisions of the United States Supreme Court (*Johannessen* and *Ginsberg*) are complete answers." Further, the Court said that "*It is not within the power of the agencies of the Government to make the grant or gift of citizenship, if the applicant fails to meet these requirements.*" (Emphasis supplied.) It should be noted, however, that the appellate court placed the revocation on the ground of fraud and not illegal procurement, stating at page 699:

"... the state court made a mistake in granting appellant citizenship. Appellant did not possess the requisite qualifications, and the court was so advised. However, the court was induced to make such mistake by the frankness of the appellant in admitting his offense, and his avowal, under oath, that he was then attached to the principles of the Constitution. The facts, however, discredit his assertion. He was not qualified for citizenship, but deceived the court into believing that he was. Such deception operated as a fraud upon the court, and this deception and fraud were evidenced by his subsequent, as well as prior, conduct."

United States v. Bischof, 48 F. 2d 538 (C. C. A. 2, 1931), involves a cancellation for lack of good character. At the time of the hearing in the State Court, the Govern-

ment objected to the granting of a certificate since Bischof had been divorced on the ground of adultery and was, therefore, not of good character. It was also conceded "that all the facts which are now presented to the Court were presented to (the State Court) at the time of the granting of naturalization." The lower court dismissed the bill for want of equity and the appellate court affirmed. The *Bischof* case follows the reasoning of earlier Third Circuit cases such as, *United States v. Srednik*, and *United States v. Richmond*, *supra*. All draw a line between jurisdictional prerequisites such as lack of a certificate of arrival (*Ness* case) and mere fact finding. They purport to find some basis for this tenuous distinction in dictum found in the *Ness* case to the effect that a decision on "minor" questions such as the competency or weight of the evidence, and the credibility of witnesses, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. These cases, at best, are of questionable value and take unwarranted liberties with the holding in the *Ness* case.¹²

In *Sourino v. United States*, 86 F. 2d 209, 300 U. S. 661 (C. C. A. 5, 1936) appellant's acquittal in a criminal prosecution for fraudulent procurement of naturalization was held not *res judicata* of issue whether his certificate had been fraudulently procured, or to constitute estoppel by judgment in a subsequent proceeding for cancellation of the certificate. The Court held that the same cause of action was not involved especially where the sole issue in the criminal case was the bar of the statute of limitations.

¹²In cases adopting the above view of *Ginsberg*, the courts review the facts irrespective of the claims of *res judicata*. See, *e.g.*, the *Unger*, *infra*, and *Gokhale* cases, *supra*. Bischof was urged and rejected in the *Chomiak* case, *infra*.

United States v. Unger, 26 F. 2d 114 (D. C. S. D. N. Y., 1928), involved a suit to cancel a certificate for lack of good moral character. In 1924 the Supreme Court of New York entered a decree admitting Unger to citizenship although it was brought to the Court's attention on the final hearing that a decree of divorce had been entered against him in 1923 on the ground of adultery. The United States had also opposed in the naturalization proceedings the granting of the decree of citizenship. The defendant raised the issue of *res judicata*. The Court cancelled the certificate on the ground that a necessary qualification (good moral character) must *in fact* exist and that if it doesn't, it "conclusively" follows that his citizenship was illegally procured. The Court adhered to the principles laid down in the *Ness*, *Tutun*, *Johannessen* and *Ginsberg* cases, *supra*. In the latter, the Supreme Court, stated: 243 U. S. 472 and 475:

"No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in Section 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

In *United States v. Parisi*, 24 Fed. Supp. 414 (Md), 1938, a certificate was cancelled for misrepresentation as to the basic statutory conditions with respect to lawful entry and residence although not made fraudulently. No opposition was offered by the Government to the naturalization order although there is some indication that it must have been apparent to custom officials that he was not entitled to enter the country.

In *United States v. Konevitch*, 67 Fed. Supp. 414 (D. Md.) it was held that the fact the Immigration Service may have known of an applicant's lack of good moral character was irrelevant since illegal procurement in addition to fraud was charged.

For other cases bearing on the question of *res judicata* see:

United States v. Doola, 177 Fed. 101 (C. C. A. 5);
United States v. Holtz, 54 Fed. Supp. 63 (N. D. Calif.) rev. *sub nom*;

Bechtel v. United States, 176 F. 2d 741 (C. A. 9);
United States v. Schenier, 55 Fed. Supp. 243 (Ore.), rev. on other grounds, *sub nom. Schenier v. United States*, 150 F. 2d 535 (C. A. 9);

United States v. Brass, 37 Fed. Supp. 698 (E. D. N. Y.);

United States v. Korner, 56 Fed. Supp. 242 (S. D. Calif.);

United States v. Kusche, 56 Fed. Supp. 201 (S. D. Calif.).

The Bridges Criminal Case and Subsequent Opinions.

In the *Bridges* criminal case, 346 U. S. 209, two questions were presented: Whether the prosecution was barred (1) by the statute of limitations, or (2) by the principles of *res judicata*, estoppel, or due process. The majority disposed of the case on the first ground, without considering the second question. However, the minority (consisting of the Late Chief Justice Vinson and Justices Reed and Minton) said (pp. 233-234):

"We therefore would affirm the judgment below as to Count I. Petitioners have also contended here that the conviction is barred because the principles of *res judicata* or collateral estoppel require us to hold that

Bridges' nonmembership during the crucial period has been judicially determined. They point to the Landis proceedings of 1938, referred to in *Bridges v. Wixon*, 326 U. S. 135, 138, this Court's decision in that case, and the naturalization proceedings themselves of 1945. None of these, though, are *res judicata* since this is a criminal cause. Nor can collateral estoppel be invoked. There has been no court holding that Bridges has not been a Communist. The Landis determination of the membership was not a judicial one. *Pearson v. Williams*, 202 U. S. 281. In *Bridges v. Wixon*, *supra*, no holding on the factual question of membership was reached. And the naturalization proceedings did not determine nonmembership because Bridges could legally have been granted citizenship even had he been found by the Court to have been a member of the Communist Party. See 8 U.S.C. (1946 ed.) sections 705, 707, which merely prohibited grant of naturalization to members of organizations advocating the overthrow of the government, or to those not attached to the Constitution. This has been changed. 8 U. S. C. section 1424(a) (2). There is no necessary identity in law between Communist Party members and such persons. See: *Schneidermann v. United States*, 320 U. S. 118; Cf. *Carlson v. Landon*, 342 U. S. 524, 536, n. 22."

In the recent Sixth Circuit denaturalization appeals in the *Sweet*, *Chomiak* and *Charnowola* cases, the defense of *res judicata* was raised. The Court of Appeals did not specifically refer to the contention, but it must be assumed that the contention was rejected, for the Court said:

"We have given due consideration to the excellent oral argument and well-prepared briefs of the astute attorney for the three appellants which present from his viewpoint, as strong as could be stated, alleged

reasons for reversal of the three separate judgments of the several district judges, but we are of the opinion that no error has been shown to inhere in the judgments.”

Incident to the petition for certiorari in *Settimo Accardo v. United States* (Oct. Term 1953, No. 614) to review the judgment of the Third Circuit (*per curiam* opinion, 208 F. 2d 632) sustaining the denaturalization of Accardo (113 Fed. Supp. 783), the issue of *res judicata* was again raised, and certiorari was denied. In that case, the complaint charged that the denaturalization was fraudulently and illegally obtained in that Accardo had failed to disclose a number of difficulties with the law. The district court judge stated with respect to the case (113 Fed. Supp. at p. 785):

“* * * Defendant further claims this conviction was known to the authorities when he entered this country the second time, at Montreal, several years earlier than his naturalization. But this information was never known to the Naturalization authorities, but only to the Department of State, which issued his visa, and to an entirely separate branch of the Immigration Office, having nothing to do with naturalization. The Naturalization authorities cannot be charged with notice of what they did not, in fact, know when this fact was known only to such widely different branches of the Government. *United States v. Riggins*, 9 Cir., 1933, 65 F. 2d 750; *United States v. Depew*, 10 Cir., 1938, 100 F. 2d 725; *Halverson v. United States*, 7 Cir., 1941, 121 F. 2d 420.”

Defendant further claims that, since all the above arrest and conviction data was known to the United States Probation Office, the United States Naturalization officials

should be charged with notice of same, even though they did not know it in fact. This is on the tenuous theory that defendant's mere mention during the naturalization proceedings of the fact tht he had been put on probation for an entirely different crime, put the Naturalization officials on notice of everything which all the files of the United States Probation Office, not the Naturalization Office, contained. If this contention were correct, then, since the Probation Office is an arm of this Court, this Court, which naturalized defendant, would, *a fortiori*, not have been at all misled by defendant's failure to disclose any arrest or conviction which appeared in its probation records. In short, when questioned as to his record, defendant need have disclosed nothing. This argument answers itself.

All the above, save the 1926 and 1940 records not relied on by plaintiff, go to the question of defendant's fraud as grounds for the revocation of his naturalization. Thus we find that the Naturalization court had before it, not a man who had but a single conviction, and another arrest, as it supposed, but a man who had frequently been in trouble with the authorities over the course of some fifteen years prior to the time of his naturalization. It was defendant's duty to disclose an arrest, as well as a conviction, in order that the Government might investigate before granting the decree. *Gaglione v. United States*, 1 Cir., 1929, 35 F. 2d 496; *in re Paoli*, D. C. Cal. 1943, 49 Fed. Supp. 128. That defendant's wilful failure to disclose this situation to the authorities had a material effect upon the action of the Naturalization officials and the Court in its decision to grant the decree, is undoubted. Particularly is this the case, since even the limited disclosures of the defendant were not passed on by the immigration officials, even tentatively, but referred to the Court for its own decision thereon.

Summation of Argument.

There is no Supreme Court Case which holds that the doctrine of *res judicata* applies to denaturalization judgments, the strongest language to indicate that it does being the dictum in *Schneiderman*. And, in general, the lower courts have refrained from applying the doctrine to such judgments. It is true, as has been shown, that the Ninth Circuit in *Pandit*, the Second Circuit in *Bischof*, and the Third Circuit in *Richmond* and *Srednik* applied to the doctrine. All but *Bischof* can be explained away by the fact that they were rejected by the Supreme Court decision in *Maney* and take unwarranted conclusions from the dictum in *Ness*. *Bischof* can be distinguished in that there was no specific objection raised to Bridges' naturalization, and it may be noted that *Bischof* was predicated on the theory that a mere irregularity, as distinguished from statutory illegality, was involved.

The dictum in *Schneiderman* is more than off-set by the strong language in the dissent in *Bridges*.

Finally, Section 338 of the 1940 Act and 1451 of the 1952 Act presuppose that, in addition to objecting to naturalization during the naturalization proceedings, the United States shall have the right to institute revocation proceedings.

A recent case is *United States v. Cufari* (D. C. Mass. 1954) 120 Fed. Supp. 941, reversed on other grounds 217 F. 2d 404, where the court held that the order admitting alien to citizenship is not *res judicata*.

And in *Stacher v. United States*, *supra*, this Court's decision affirming denaturalization, noted that the defense of *res judicata* had been raised in the district court, in a case where denaturalization was granted for concealment

of prior arrests, and certiorari was denied by the Supreme Court.

Quotations from the restatement of judgments (Appellant's Br. 17) are not helpful on the question, because there the judgment referred to is obviously after a contested trial of the issues, whereas, the vital distinction in a naturalization proceeding is that, unless something arises which provokes a recommendation of the Immigration Service against granting the naturalization, it is never a contested trial in the usual understood sense, but it is rather an *ex parte* application for the grant of a privilege upon qualification for that privilege. And in the application the duty rests upon the applicant to make a full disclosure and, in particular, where questions are asked about a particular subject, to truthfully disclose and answer, and not to secure the privilege of naturalization by devious and false means.

To say that the statement from the restatement of judgments that "A judgment obtained merely by false or perjured testimony, or the production of false documents or even by conspiracy between the prevailing party and witnesses, is not open to later attack" (Appellant's Br. 17), applies to a case of an application for naturalization, is to invite applicants for naturalization, by fair means or foul, to conceal from the Immigration authorities any adverse material so long as it does not bear directly on a "jurisdictional" fact.

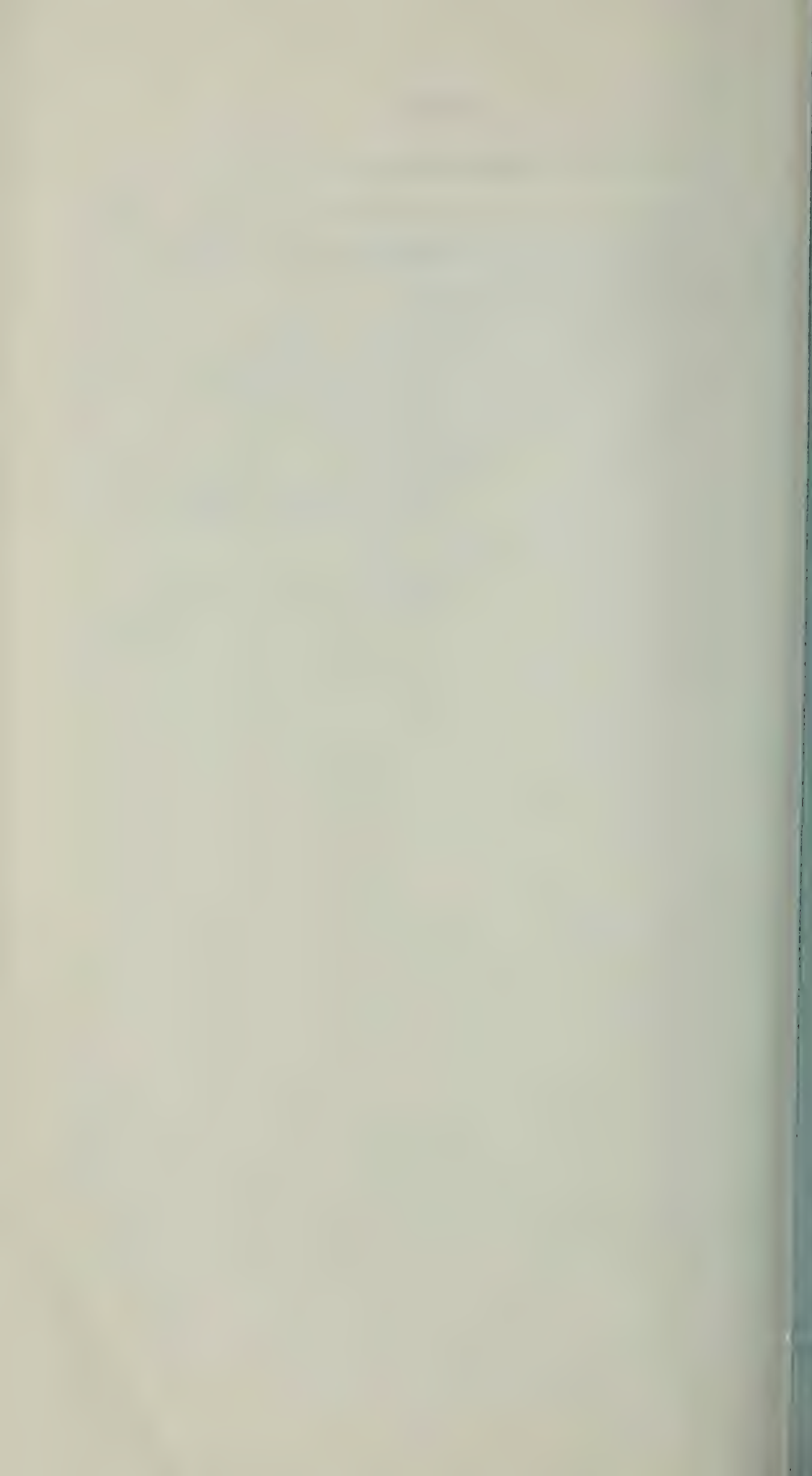
Conclusion.

It is respectfully submitted that the Findings, Conclusions and Judgment of the District Court denaturalizing the appellant should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

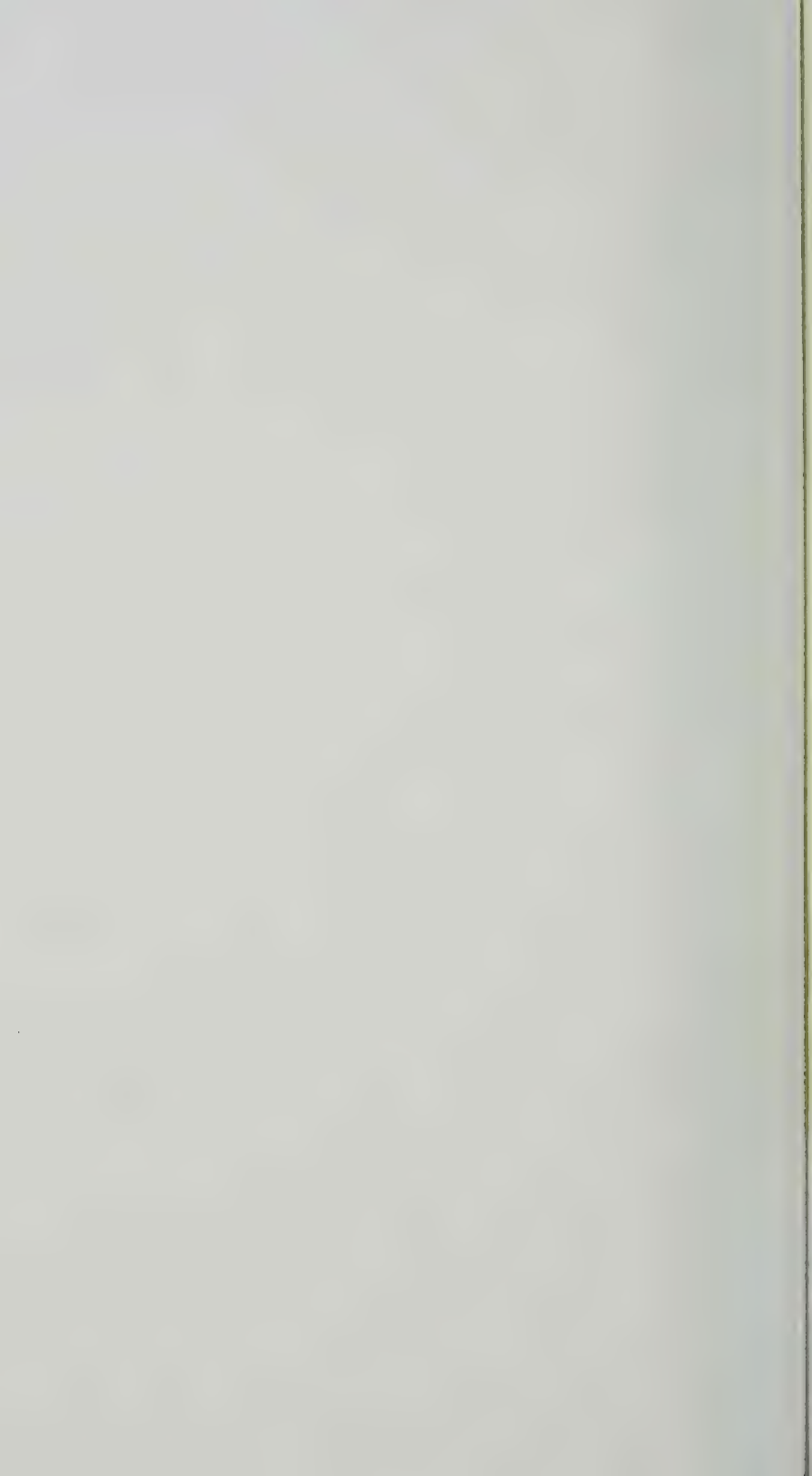
RICHARD A. LAVINE,
*Assistant U. S. Attorney,
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ARLINE MARTIN,
*Assistant U. S. Attorney,
Attorneys for Appellee.*

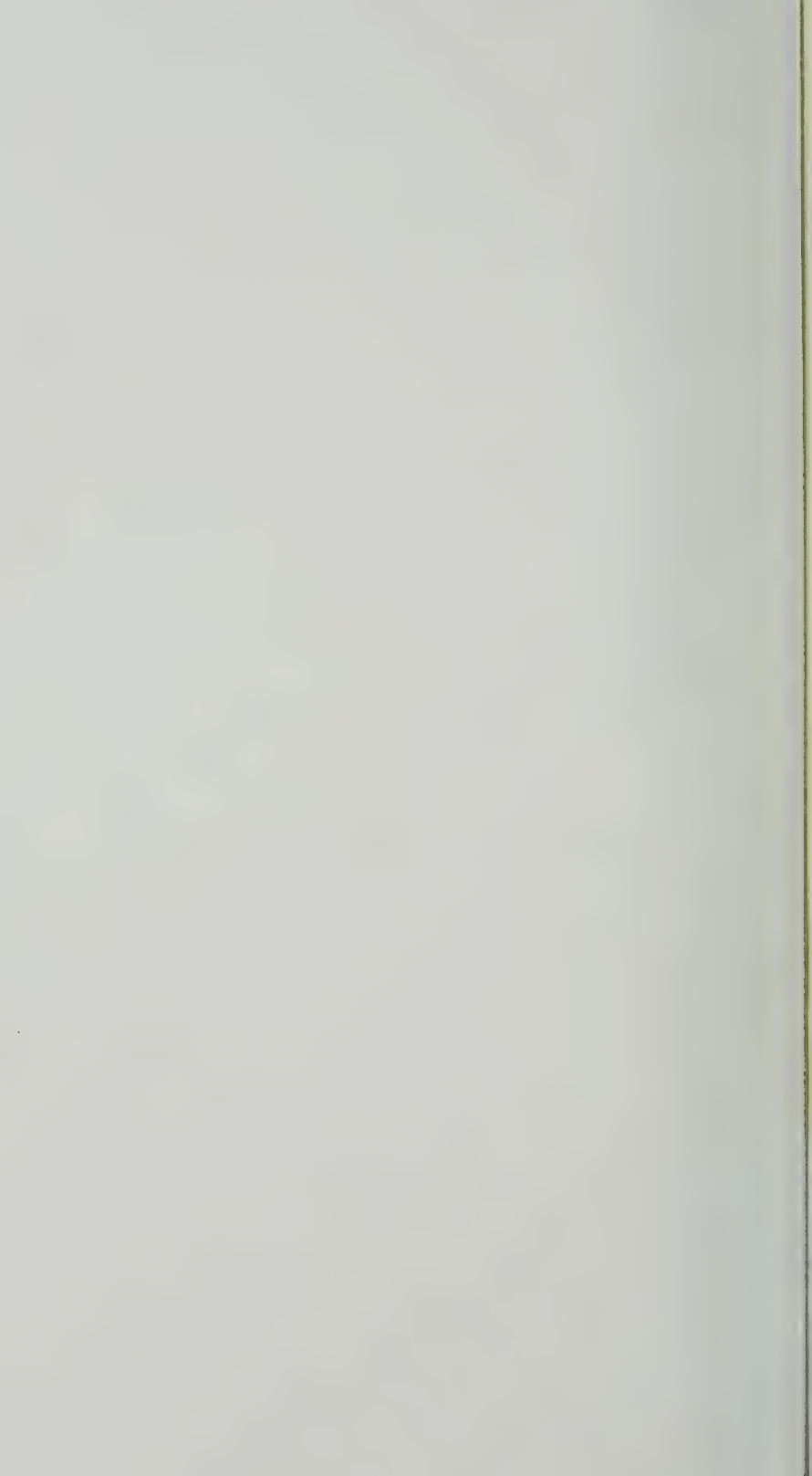


APPENDIX A.

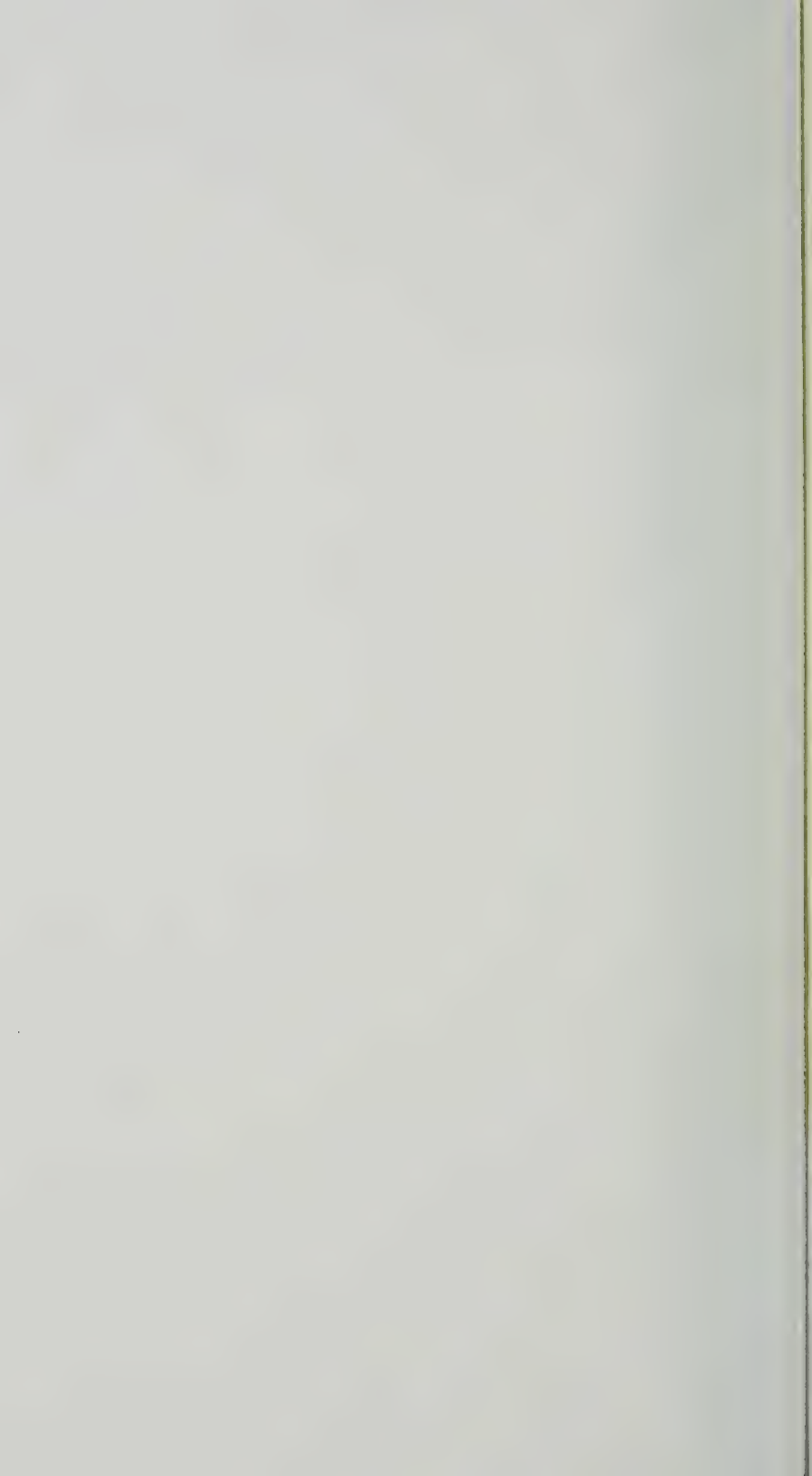
Government's Exhibit 2-A and 2-B in Evidence, Being
Application for a Certificate of Arrival and Pre-
liminary Form for Petition for Naturalization.



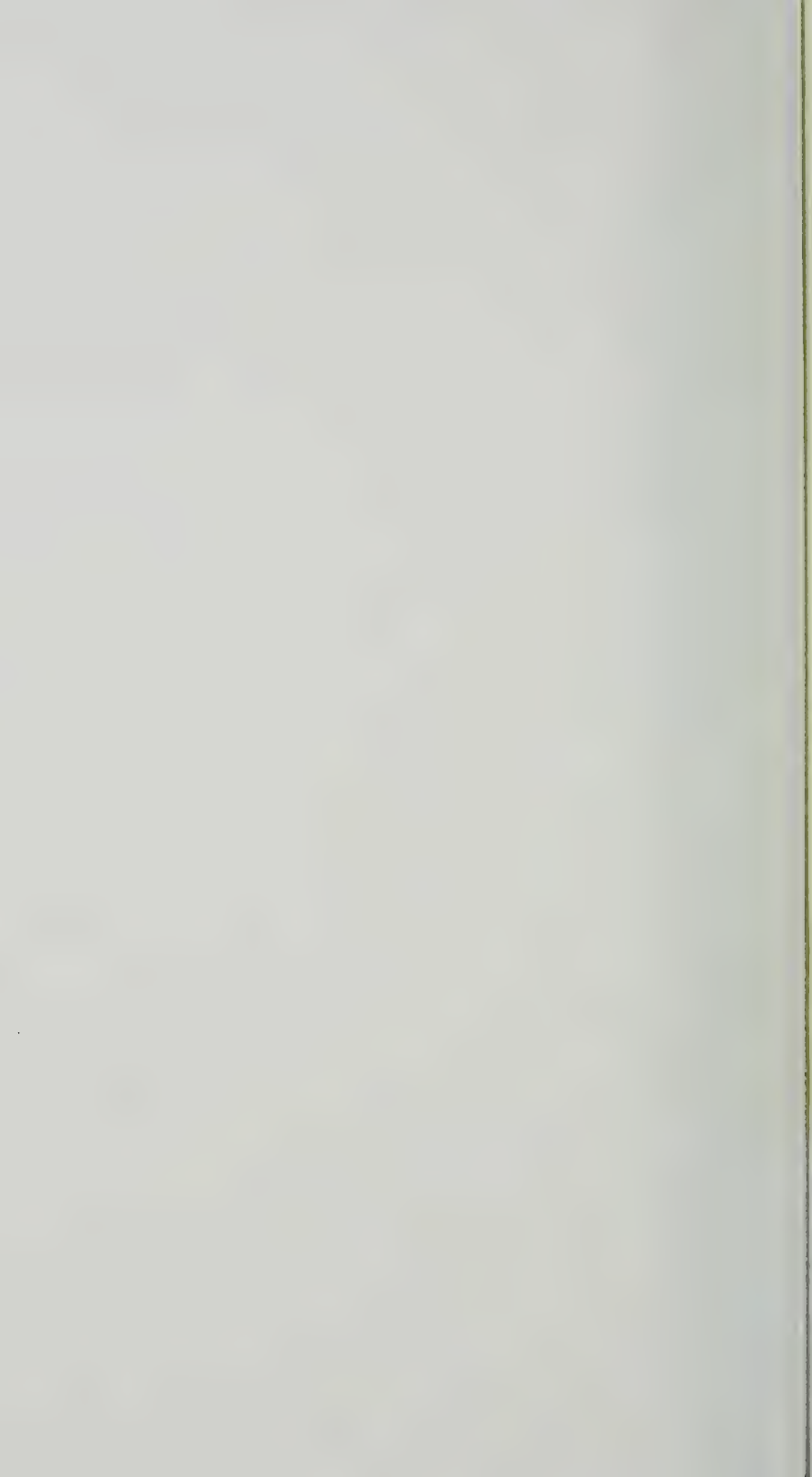
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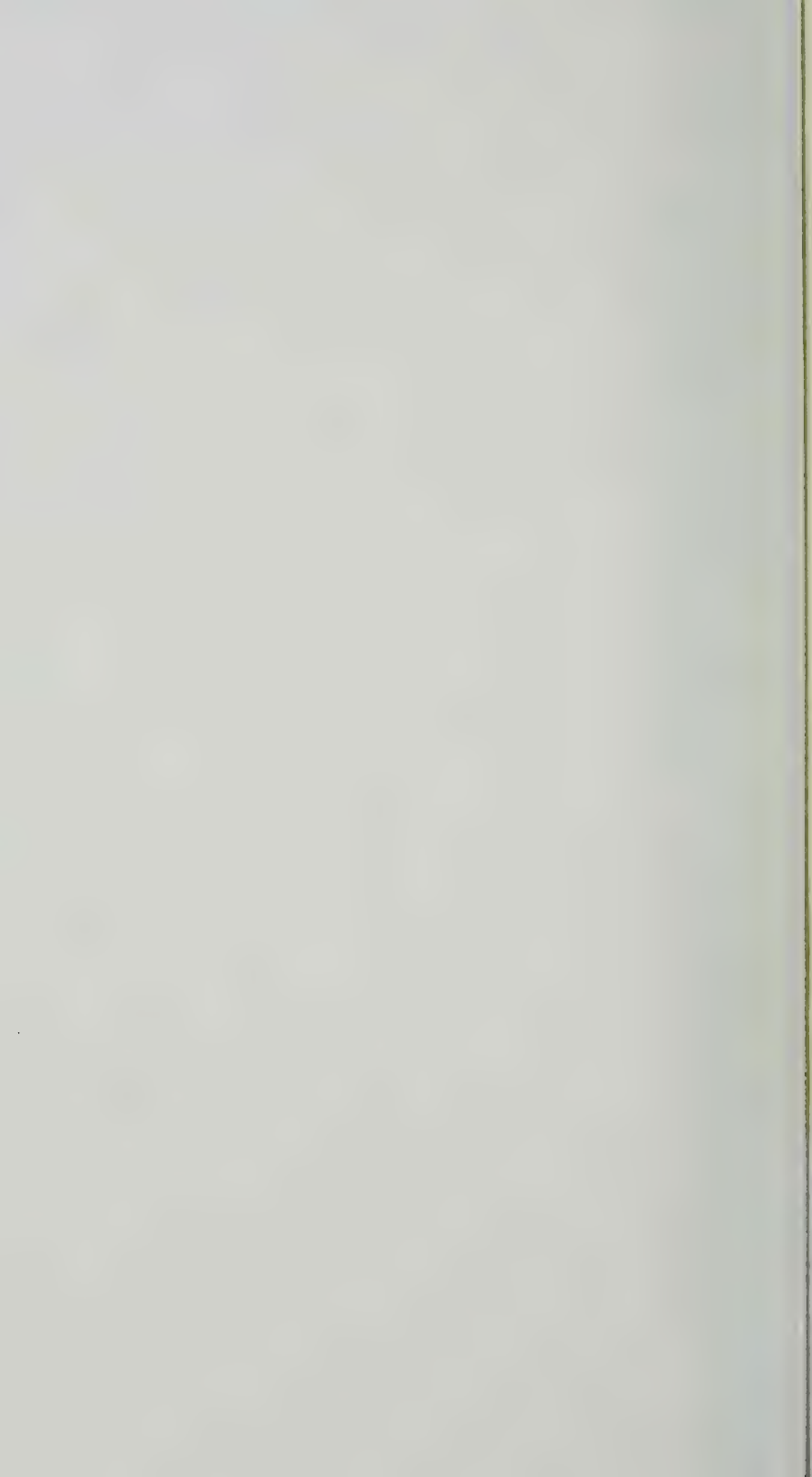
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APPENDIX C.

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United States of America, Plaintiff, v. Peter Chaunt, also known as Ladislans Leitner, also known as Leslie Bela Leitner, Defendant. Civil 15907-WM.

Second Amended Complaint to Set Aside and Cancel Naturalization

Plaintiff, United States of America, complains of defendant and for causes of action alleges that:

FIRST CAUSE OF ACTION

(Concealment of Material Facts)

I

The plaintiff is a corporate sovereign, and this action is brought pursuant to the direction of the Attorney General of the United States and under the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 (Public Law No. 414; 82nd Congress), (8 U.S.C.A., Section 1451(a)],

II

The last known residence of the defendant is 310 M Washington Drive, Los Angeles, California, within the Southern District of California, Central Division, and within the jurisdiction of this Court.

III

On or about June 27, 1940, the defendant, Peter Chaunt also known as Ladislans Leitner, and also known as Leslie Bela Leitner, who was then an alien and a native of Hungary, filed a Petition for Naturalization in the United States District Court for the Eastern District of New York.

IV

On or about November 28, 1940, the aforesaid petition was granted by said Court, and on said date Certificate of Naturalization No. 4785200 was issued to the defendant.

V

The Order admitting defendant to citizenship, and said Certificate of Naturalization, issued as aforesaid, were

[AM] intentional
procured by the defendant from said Court by a concealment of material facts, in that defendant, in the proceed-

[AM] intentionally
ings which led to his naturalization, a concealed the following material facts: (1) That prior to and at the time of filing said Petition for naturalization and at the time of his naturalization, defendant was an active member and officer of the Communist Party of the United States and had been since on or about the year 1926; (2) that prior to said naturalization the defendant had been arrested and charged with violation of the city ordinances of the City of New Haven, Connecticut as follows: (a) On or about July 30, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, of

the said city and town of New Haven, did then and there distribute in a public street, to wit: Ashmun Street, certain hand-bills against the peace of the State, of evil example, and contrary to the ordinance in such case made and provided. Ord. 729 Disposition, "Plea—not guilty—Discharged"; (b) On or about December 21, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, temporarily of said city and town, did make an oration, harrangue, or other public demonstration in New Haven Green, outside of the churches. Pages 609 Charter and Ordinances" Disposition, "Demurrer filed 12-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J.S."; (d) On or about April 7, 1930, defendant was arrested and charged in the Criminal Court of Common Pleas, New Haven, Connecticut, as follows: "Edwin S. Pickett, Prosecuting Attorney of the Criminal Court of Common Pleas of New Haven County, now here in Court, information makes that at the town of New Haven, within the County of New Haven, on the 11th day of March, 1930, Peter Chaunt of New Haven, with force and arms, did then and there disturb and break the peace by tumultuous and offensive carriage, noise and behavior, against the peace, of evil example, and contrary to the statute in such case made and provided; whereupon the attorney prays the advice of this Honorable Court in the premises"; that defendant pleaded not guilty on April 7, 1930, and disposition was "nolled" April 7, 1930"; (c) That on the 11th day of March, 1930, defendant was arrested and charged at said city and town of New Haven that he "did commit, violate, Peter Chaunt, general breach of peace"; "plea N.G., finding G, ordered to be imprisoned in New Haven County Jail and/or to pay fine of \$25.00 to stand committed until judgment satisfied. Appealed"; (3) that during the five

years immediately preceding the date of defendant's petition for naturalization defendant was not and did not behave as a person of good moral character by reason among other facts of the facts as herein alleged and the concealment thereof, as herein alleged, in violation of the fourth subdivision of Section 4 of said Naturalization Act of 1906, as amended.

VI

The facts so concealed, as alleged in paragraph V hereof, are material for the reason that they violate the requirements for naturalization as provided by the Nationality Act of 1906, as amended, and for the further reason that as a result of said concealment, the Immigration and Naturalization Service and the Court did not make a further investigation as to the nature and principles of the Communist Party of which defendant was a member, and did not make a full and proper investigation as to whether or not defendant subscribed to the principles of the Communist Party or whether defendant was or had behaved as a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, or whether or not defendant could in open court take oath of allegiance to the United States without any mental reservation or purpose of evasion, as required by Section 4, subdivisions 3, of the Nationality Act of 1906, as amended, and by Rule 8(c) of the Rules and Regulations of the Immigration and Naturalization Service, and, as a result of said concealment, said Immigration and Naturalization Service did not make a full and proper investigation as to whether defendant had all of the qualifications for citizenship required by the Nationality Act or 1906, as amended, and, as a result thereof, said Immigration and Naturalization Service made a recommendation to the Court that said Petition

for Naturalization be granted, and said Court granted said Petition for Naturalization.

VII

Before the filing of this Amended Complaint, an affidavit was executed by Maurice A. Roberts, an attorney of the Immigration and Naturalization Service, United States Department of Justice, showing good and sufficient cause for the institution of this proceeding under, and as required by, the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 (8 U.S.C.A., Section 1451(a)), to set aside and cancel the naturalization of said defendant, Peter Chaunt, as having been procured by concealment of material facts and by willful misrepresentation, which affidavit is attached hereto, marked EXHIBIT "A" and made a part hereof, the same as though set forth at length herein.

SECOND CAUSE OF ACTION (Willful Misrepresentation)

I

Plaintiff repeats and realleges as a part of this cause of action each and all of the allegations contained in paragraphs I, II, III, IV and VII of the First Cause of Action, and makes them a part hereof as though set forth at this point.

II

Said order admitting defendant to citizenship and said Certificate of Naturalization were procured by defendant by willful misrepresentation in that defendant in the proceedings which lead to his naturalization (1) intentionally and falsely represented that the only organization to which he belonged was the "Fraternal Benefit Society of International Workers Order," and no others, and in answer to an oral question propounded by Reuben E. Wilson, Nat-

uralization Examiner, as follows: "Have you ever belonged to any Communist, Nazi or Fascist organization," defendant intentionally and falsely answered "No," whereas, in truth and in fact, the defendant, from on or about the year 1926, had been an active member and officer of the Communist Party of the United States; (2) intentionally and falsely represented that during the five years immediately preceeding the date of his Petition for Naturalization defendant was, and behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, and intentionally and falsely represented that it was the defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, estate or sovereignty, and that it was his intention to bear true faith and allegiance to the United States of America and to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, whereas, in truth and in fact, by reason of defendant's membership in, and his knowledge of the nature and principles of the Communist Party, the defendant was not and had not behaved as a person attached to the principles of the Constitution of the United States or well disposed to the good order and happiness of the United States, and it was not defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and it was not his intention to bear true faith and allegiance to the United States of America or to support or defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; (3) intentionally and falsely represented that prior to said naturalization he had never been arrested or charged with violation of any law of the United States

or state or any city ordinance or traffic regulation, whereas in truth and in fact defendant had been arrested and charged with violation of the city ordinances of the City of New Haven, Connecticut, as follows: (a) On or about July 30, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, of the said city and town of New Haven, did then and there distribute in a public street, to wit: Ashmun Street, certain hand-bills against the peace of the State, of evil example, and contrary to the ordinance in such case made and provided. Ord. 729, Disposition, "Plea—not guilty—Discharged"; (b) On or about December 21, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, temporarily of said city and town did make an oration, harrangue, or other public demonstration in New Haven Green, outside of the churches. Pages 609 Charter and Ordinances" Disposition, "Demurrer filed 2-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J.S." (c) On or about April 7, 1930, defendant was arrested and charged in the Criminal Court of Common Pleas, New Haven Connecticut, as follows: "Edwin S. Pickett, Prosecuting Attorney of the Criminal Court of Common Pleas of New Haven, County, now here in Court, information makes that at the town of New Haven, within the County of New Haven, on the 11th day of March, 1930, Peter Chaunt of New Haven, with force and arms, did then and there disturb and break the peace by tumultuous and offensive carriage, noise and behavior, against the peace, of evil example, and contrary to the statute in such case made and provided; whereupon the attorney prays the advice of this Honorable Court in the premises"; that defendant pleaded not guilty on April 7, 1930, and disposition was 'nolled' April 7, 1930"; (d) That on the 11th day of

March, 1930, defendant was arrested and charged at said city and town of New Haven that he “did commit, violate, Peter Chaunt, general breach of the peace”; “plea N.G., finding G, ordered to be imprisoned in New Haven County Jail and/or to pay fine of \$25.00 to stand committed until judgment satisfied. Appealed”; (4) Intentionally and falsely represented that during the five years immediately preceeding the date of defendant’s Petition for Naturalization he was and had behaved as a person of good moral character, whereas, in truth and in fact, among other things, by reason of the intentional and false misrepresentations as herein alleged, defendant was not and had not behaved as a person of good moral character during said period.

III

That the Communist Party of the United States is an organization which at all times since 1926, as the said Peter Chaunt well knew, advised, advocated, *or* and [AM] taught the overthrow by force *or* and [AM] violence of the government of the United States; advised, advocated, *or* and [AM] taught the duty, necessity, *or* and [AM] propriety of the unlawful assaulting *or* and [AM] killing of any officer or officers of the government of the United States because of his or their official character; advised, advocated, *or* and [AM] taught the unlawful damage, injury *or* and [AM] destruction of property; advised, advocated, *or* and [AM] taught sabotage; wrote, circulated, distributed, printed, published, *or* and [AM] displayed, or caused to be written, circulated, distributed, printed, published, *or* and [AM] displayed or had in its possession for the purpose of circulation, distribution, publication, issuing, *or* and [AM] display, written and printed matter which advised, advocated, *or* and [AM] taught the performance of the acts described hereinabove in this para-

graph; promoted influenced, and advocated the political activities, public relations, and public policy of the Union of Soviet Socialist Republics.

IV

That at all of the times above mentioned, as the said Peter Chaunt well knew, the Communist Party of the United States was a section of an international organization called "The Communist International" and that decisions made by such organization were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

V

As a result of the intentional and willful misrepresentations by the defendant, as alleged in paragraph II hereof, the Immigration and Naturalization Service and the Court did not make a further investigation and did not make a full and proper investigation as to whether defendant had all of the qualifications for citizenship required by the Nationality Act of 1906, as amended, and as a result thereof said Immigration and Naturalization Service made a recommendation to the Court that said Petition for Naturalization be granted, and said Court granted said Petition for Naturalization.

WHEREFORE, plaintiff prays that:

1. The order of the United States District Court for the Eastern District of New York, dated on or about November 28, 1940, admitting defendant to citizenship, be revoked and set aside;

2. All official documents evidencing citizenship issued to defendant by virtue of the aforesaid Order, and particularly the original Certificate of Naturalization No.

4785200 and duplicate Certificate of Naturalization No. 4785200 be cancelled and declared null and void:

3. Defendant be forever restrained and enjoined from setting up and claiming any rights, privileges, or advantages whatsoever under said order or any official document evidencing citizenship by virtue of the aforesaid order;

4. Upon entry of final decree in this case, as heretofore prayed, that same be entered and spread upon the records of this Court, and that said defendant be required to forthwith surrender and deliver his said Certificate of Naturalization to the Clerk of this Court for Cancellation, and that the Clerk of this Court be further directed to transmit a certified copy of said final decree herein, cancelling such Certificate and setting aside said Order admitting defendant to citizenship, to the Attorney General of the United States, and to the Clerk of the United States District Court in and for the Eastern District of New York, with the directions that the same be entered upon the record in that Court, and that the original Certificate of Naturalization upon the records of Court in the Eastern District of New York be cancelled; and

5. Plaintiff have such other relief as to this Honorable Court may deem proper in the premises.

LAUGHLIN E. WATERS
United States Attorney

MAX F. DEUTZ
Assistant U. S. Attorney
Chief, Civil Division

ARLINE MARTIN
Assistant U. S. Attorney

s/ ARLINE MARTIN

ARLINE MARTIN

Attorneys for Plaintiff

(III) That he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; that it was his intention to re-

nounce absolutely and forever all allegiances and fidelity to any foreign prince, potentate, state, or sovereignty of which he was a subject or citizen.

(IV) That he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation freely without any mental reservation or purpose of evasion.

(c) That the allegations of said PETER CHAUNT as set forth in subparagraph 1 (b) were false and untrue.

(d) That the said PETER CHAUNT has been an active member and officer of the Communist Party of the United States, including the Workers (Communist) Party and other organizations affiliated with or controlled by the Communist Party of the United States since at least 1926.

(e) That the Communist Party of the United States is an organization which at all times since 1926, as the said PETER CHAUNT well knew:

(I) Advised, advocated, or taught the overthrow by force or violence of the government of the United States;

(II) Advised, advocated, or taught the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(III) Advised, advocated, or taught the unlawful damage, injury or destruction of property;

(IV) advised, advocate, or taught sabotage;

(V) Wrote, circulated, distributed, printed, published, or displayed, or caused to be written, circulated, distributed, printed, published, or displayed or had in its possession for the purpose of circulation, distribution, publication, issuing, or display, written and printed matter which advised, advocated, or taught the performance of the acts described in subparagraphs 1(e), I, II, III and IV.

(VI) Promoted, influenced, and advocated the political activities, public relations, and public policy of the Union of Soviet Socialistic Republics.

(f) That at all of the times above mentioned, as the said PETER CHAUNT well knew, the Communist Party of the United States was a section of the international organization whose principal officers were citizens or subjects of the Union of Soviet Socialist Republics and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such organization were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

(g) That by reason of the foregoing, the said PETER CHAUNT at the time he applied for and obtained naturalization; was not attached to the principles of the Constitution or well disposed to the good order and happiness of the United States; did not intend to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and did not intend to abjure or renounce allegi-

ance and fidelity to the Union of Soviet Socialist Republics.

(h) That the said PETER CHAUNT intentionally and deliberately made false statements and concealed the true facts in the proceedings leading to his naturalization, as set forth in the preceding subparagraphs, in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to induce the naturalization examiner to make an unconditional recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law.

2. That good cause exists for the institution of a suit under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), to set aside and cancel the naturalization of said PETER CHAUNT as having been procured by concealment of material facts and by wilful misrepresentation.

3. That the last known place of residence of the said PETER CHAUNT is 3305 West 34th Street, Cleveland, Ohio.

MAURICE A. ROBERTS

Attorney

Subscribed and sworn to at Washington in the District of Columbia this 6th day of May, 1953, before me, the Assistant General Counsel of the Immigration and Naturalization Service, United States Department of Justice, authorized by Section 332d.1 of Title 8 of the Code of Federal Regulations to administer oaths.

ALBERT E. REITHEL(?)

Assistant General Counsel

[Filed Apr. 21, 1955; Edmund L. Smith, Clerk; by Charles E. Jones, Deputy Clerk.]

APPENDIX D.

Margolis, McTernan and Branton
Attorneys at Law
112 West Ninth Street
Los Angeles 15, California
Phone VAndike 7153
Attorneys for Defendant.

In the United States District Court in and for the
Southern District of California, Central Division.

United States of America, Plaintiff, v. Peter Chaunt,
Defendant. No. 15,907-WM.

Answer to Second Amended Complaint

The defendant above-named, Peter Chaunt, hereby answers the second amended complaint herein as follows:

I

Admits the allegations of paragraphs I, II, III and IV of the first cause of action.

II

Generally denies each and all of the allegations of paragraph V of the first cause of action.

III

Generally denies the allegations of paragraph VI of the first cause of action and specifically denies that the Immigration and Naturalization Service reasonably relied solely upon facts supplied by the defendant in failing to make a further, full and proper investigation of defendant's qualifications for citizenship as alleged in paragraph VI thereof.

SECOND CAUSE OF ACTION

I

Defendant refers to and by this reference incorporates herein as if fully set forth his answers to the allegations of paragraphs I, II, III and IV of the first cause of action of said complaint.

II

Defendant generally denies the allegations of paragraph II of the second cause of action.

III

Defendant generally denies all of the allegations of paragraphs III and IV of the second cause of action and alleges that the same are and each of them is immaterial.

IV

Defendant generally denies the allegations of paragraph V of the second cause of action and specifically denies that the Immigration and Naturalization Service reasonably relied solely upon facts disclosed by the defendant in failing to make a further, full and proper investigation of defendant's qualifications for citizenship as alleged in paragraph V thereof.

AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

I

The second amended complaint in whole, and each of the causes of action thereof, fails to state a cause of action or claim upon which relief can be granted against this defendant.

AS AND FOR A THIRD, SEPARATE AND AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

I

The decree and certificate of naturalization referred to in paragraph IV of the first cause of action of the complaint is *res judicata* and conclusive of all matters and issues determined or determinable in the naturalization proceeding including all such issues pleaded in the second amended complaint.

AS AND FOR A FOURTH, SEPARATE AND AFFIRMATIVE
DEFENSE, DEFENDANT ALLEGES:

I

The Court is without jurisdiction of the action in that Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1451) under which the complaint is drawn (hereinafter referred to as "the statute") is unconstitutional and void both upon its face and as applied to the defendant in the following respects:

- (a) That in providing for cancellation of a decree and judgment of naturalization a court of competent jurisdiction, after proceedings to which the United States was a party and from which no appeal was taken, the statute violates the separation of powers prescribed by the Constitution and denies defendant due process of law contrary to the guarantees of the Fifth Amendment thereto.
- (b) That in authorizing cancellation of such a decree upon grounds not prescribed at the time of naturalization, the statute is an *ex post facto* law repugnant to Article I, Section 9, Chapter 3 of the Constitution of the United States.

- (c) That as applied to the defendant under the circumstances alleged in the complaint the statute is an *ex post facto* law and a bill of attainder in violation of Article I, Section 9 of the Constitution.
- (d) That the statute on its face is vague, ambiguous and uncertain, and fails to provide any clearly ascertainable standard of disclosure for the guidance of petitioners in naturalization proceedings, in violation of the due process clause of the Constitution.
- (e) That in providing for deprivation of citizenship without the right of trial by jury the statute denies the defendant due process of law in violation of the Fifth Amendment to the Constitution.
- (f) That the statute abridges liberty of speech, assembly, and association, and activities in furtherance thereof, in violation of the First Amendment to the Constitution.

WHEREFORE, defendant prays that plaintiff take nothing by its action herein, that the second amended complaint may be dismissed, and that the defendant may have judgment for his costs.

MARGOLIS, McTERNAN AND BRANTON

By JOHN W. PORTER

John W. Porter

Attorneys for Defendant.

[Filed Nov. 7, 1955, Clerk U. S. District Court, Southern District of California. By Wayne Payne, Deputy Clerk.]

APPENDIX E.

Laughlin E. Waters
United States Attorney
Richard A. Lavine
Assistant U. S. Attorney
Chief of Civil Division
Arline Martin
Assistant U. S. Attorney
600 Federal Building
Los Angeles 12, California
Telephone: MAdison 5-7411
Attorneys for Plaintiff

United States District Court for the Southern District
of California, Central Division

United States of America, Plaintiff, v. Peter Chaunt,
Defendant. Civil No. 15907-WM.

Findings of Fact, Conclusions of Law, and Judgment

The above entitled matter came on regularly for trial on the 5th day of March, 1957, and continued thereafter on the 6th, 7th and 8th days of March, and was continued thereafter to April 1, 1957, and trial was completed on that date, in the above entitled court, before the Honorable William C. Mathes, Judge presiding, without a jury, the plaintiff, United States of America, being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine, Arline Martin and James R. Dooley, Assistant United States Attorneys, the defendant being represented by his attorneys, Margolis, McTernan and Branton and John W. Porter, and evidence both oral and documentary having been presented, and the matter having been tried on its merits, and the Court having heard the arguments of counsel, and being fully advised in the

premises, and having on the 1st day of April, 1957, announced its findings and opinions in open court, now [AM/hh Attys. 6 Clk. U. S. D. C. Atty Gen.] makes its Findings of Fact, Conclusions of Law, and Judgment:

FINDINGS OF FACT
(First Cause of Action)

I

The plaintiff is a corporate sovereign, and this action is brought pursuant to the direction of the Attorney General of the United States and under the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 (Public Law No. 414; 82nd Congress) [8 U.S.C.A. §1451(a)].

II

The last known residence of the defendant is 4812 Glenalbyn Drive, Los Angeles, California, within the Southern District of California, Central Division, and within the jurisdiction of this Court.

III

On or about June 27, 1940, the defendant, Peter Chaunt, also known as Ladislans Leitner, and also known as Leslie Bela Leitner, who was then an alien and a native of Hungary, filed a Petition for Naturalization in the United States District Court for the Eastern District of New York.

IV

On or about November 28, 1940, the aforesaid petition was granted by said court, and on said date Certificate of Naturalization No. 4785200 was issued to the defendant.

V

[Mathes, J.] establishing

There is clear, unequivocal and convincing evidence [^] beyond all reasonable doubt that the order admitting defendant to citizenship, and said certificate of naturalization, issued as aforesaid, were procured by the defendant from said court by knowing, intentional, deliberate, designed, purposeful and willful concealment of material facts, in that defendant, in the proceedings which led to his naturalization, knowingly, intentionally, deliberately, designedly, purposely and willfully concealed the following material facts: (1) that prior to and at the time of filing said petition for naturalization and at the time of his naturalization, and subsequent thereto at least until the year 1952, defendant was an active member, officer and full-time paid functionary of the Communist Party of the United States and had been since on or about the year 1929; (2) that prior to said naturalization the defendant had been arrested and charged with violation of the city ordinances of the City of New Haven, Connecticut as follows: (a) On or about July 30, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, of the said city and town of New Haven, did then and there distribute in a public street, to wit: Ashmun Street, certain hand-bills against the peace of the State, of evil example, and contrary to the ordinance in such case made and provided. Ord. 729 Disposition, "Plea—not guilty—Discharged"; (b) On or about December 21, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, temporarily of said city and town, did make an oration, harangue, or other public demonstration in New Haven Green, outside of the churches. Pages 609 Charter and Ordinances" Disposition, "Demurrer

filed 12-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J. S.”; (c) that on the 11th day of March, 1930, defendant was arrested and charged at said city and town of New Haven that he “did commit, violate, Peter Chaunt, general breach of peace”; “plea N.G., finding G, ordered to be imprisoned in New Haven County Jail and/or to pay fine of \$25.00 to stand committed until judgment satisfied. Appealed”; (d) that five years immediately preceding the [Mathes, J.] during the [^] date of defendant’s petition for naturalization defendant was not and did not behave as a person of good moral character by reason among other facts of the facts as herein alleged and the concealment thereof, as herein alleged, in violation of the fourth subdivision of Section 4 of said Naturalization Act of 1906, as amended.

VI

The facts so concealed, as alleged in paragraph V hereof, are material for the reason that they violate the requirements for naturalization as provided by the Nationality Act of 1906, as amended, and for the further reason that as a result of said concealment, the Immigration and Naturalization Service and the court was foreclosed from making a further investigation as to whether or not defendant subscribed to the principles of the Communist Party or whether defendant was, or had behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, or whether or not defendant could in open court take oath of allegiance to the United States without any mental reservation or purpose of evasion, as required by Section 4, subdivision 3, of the Nationality Act of 1906, as amended, and by Rule 8(c) of the Rules and Regulations of the Immigration and Naturalization Service, and, as a result of said conceal-

ment, said Immigration and Naturalization Service did not make a full and proper investigation as to whether defendant had all of the qualifications for citizenship, including defendant's good moral character during the statutory period preceding naturalization, as required by the Nationality Act of 1906, as amended, and as a result thereof said Immigration and Naturalization Service made a recommendation to the court that said Petition for Naturalization be granted, and said court granted said Petition for Naturalization.

VII

Before the filing of this Amended Complaint, an affidavit was executed by Maurice A. Roberts, an attorney of the Immigration and Naturalization Service, United States Department of Justice, showing good and sufficient cause for the institution of this proceeding under, and as required by, the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 [8 U.S.C.A., 1451(a)], to set aside and cancel the naturalization of said defendant, Peter Chaunt, as having been procured by concealment of material facts and by willful misrepresentation; a copy of said affidavit was attached to the original Complaint herein and to the Second Amended Complaint herein, on which the action was tried, marked EXHIBIT "A", and the original of said affidavit was introduced in evidence as Plaintiff's Exhibit 36.

FINDINGS OF FACT

(Second Cause of Action)

I

The plaintiff is a corporate sovereign, and this action is brought pursuant to the direction of the Attorney General of the United States and under the provisions of Sections

340(a) of the Immigration and Nationality Act of 1952 (Public Law No. 414; 82nd Congress) [8 U.S.C. §1451(a)].

II

The last known residence of the defendant is 4812 Glenalbyn Drive, Los Angeles, California, within the Southern District of California, Central Division, and within the jurisdiction of this Court.

III

On or about June 27, 1940, the defendant, Peter Chaunt, also known as Ladislans Leitner, and also known as Leslie Bela Leitner, who was then an alien and a native of Hungary, filed a Petition for Naturalization in the United States District Court for the Eastern District of New York.

IV

On or about November 28, 1940, the aforesaid petition was granted by said court, and on said date Certificate of Naturalization No. 4785200 was issued to the defendant.

V

The evidence is clear, unequivocal and convincing, establishes [Mathes, J.] and [^] beyond all reasonable doubt, that said order admitting defendant to citizenship and said Certificate of Naturalization were procured by defendant by affirmative, fraudulent and willful misrepresentation, in that the defendant in the proceedings which lead to his naturalization (1) intentionally and falsely represented that the only organization to which he belonged was the "Fraternal Benefit Society of International Workers Order", and no others, and in answer to an oral question propounded by Reuben E. Wilson, Naturalization Examiner, as follows: "Do you believe in Communism, Fascism or

Nazism?" defendant intentionally and falsely answered "No", whereas, in truth and in fact, the defendant, from on or about the year 1926, had been an active member and officer of the Communist Party of the United States; (2) intentionally and falsely represented that during the five years immediately preceding the date of his Petition for Naturalization defendant was, and behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, and intentionally and falsely represented that it was the defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, estate or sovereignty, and that it was his intention to bear true faith and allegiance to the United States of America and to support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, whereas, in truth and in fact, by reason of defendant's membership in, and his knowledge of the nature and principles of the Communist Party, the defendant was not, and had not behaved as a person attached to the principles of the Constitution of the United States or well disposed to the good order and happiness of the United States, and it was not defendant's intention to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and it was not his intention to bear true faith and allegiance to the United States of America or to support or defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; (3) intentionally and falsely represented that prior to said naturalization he had never been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic regulation, whereas in truth and in fact defendant had been

arrested and charged with violation of the city ordinances of the City of New Haven, Connecticut, as follows: (a) On or about July 30, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, of said city and town of New Haven, did then and there distribute in a public street, to wit: Ashmun Street, certain hand-bills against the peace of the State, of evil example, and contrary to the ordinance in such case made and provided. Ord. 729," Disposition, "Plea—not guilty—Discharged"; (b) On or about December 21, 1929, defendant was arrested on the charge that "at said city and town of New Haven, Peter Chaunt, temporarily of said city and town did make an oration, harangue, or other public demonstration in New Haven Green, outside of the churches. Pages 609 Charter and Ordinances" Disposition, "Demurrer filed 2-27-29. Demurrer overruled—Whitaker 12-27-28, plea—not guilty, Found J.S."; (c) That on the 11th day of March, 1930, defendant was arrested and charged at said city and town of New Haven that he "did commit, violate, Peter Chaunt, general breach of the peace"; "plea N.G., finding G, ordered to be imprisoned in New Haven County Jail and/or to pay fine of \$25.00 to stand committed until judgment satisfied. Appealed"; (d) Intentionally and falsely represented that during the five years immediately preceding date of defendant's Petition for Naturalization he was and had behaved as a person of good moral character, whereas, in truth and in fact, among other things, by reason of the intentional and false misrepresentations as herein alleged, defendant was not and had not behaved as a person of good moral character during said period.

VI

The evidence is clear, unequivocal and convincing, and establishes beyond all reasonable doubt that the Commu-

nist Party of the United States is an organization which at all times since 1926, as the said Peter Chaunt well knew, advised, advocated and taught the necessity and the duty to overthrow by force and violence the government of the United States; wrote, circulated, distributed, printed, published and displayed, or caused to be written, circulated, distributed, printed, published, or displayed or had in its possession for the purpose of circulation, distribution, publication, issuing, or display, written and printed matter which advised, advocated and taught the performance of the acts described hereinabove in this paragraph; and promoted, influenced, and advocated the political activities, public relations, and public policy of the Union of Soviet Socialist Republics.

VII

The evidence is clear, unequivocal and convincing, and establishes [Mathes, J.]

^ beyond all reasonable doubt that at all of the times above mentioned, as the said Peter Chaunt well knew, the Communist Party of the United States was a section of an international organization called "The Communist International", and that decisions made by such organization were binding upon other Communist Partys, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

VIII

The evidence is clear, unequivocal and convincing, and establishes [Mathes, J.]

^ beyond all reasonable doubt that at all times above mentioned the defendant was attached to the principles of Marxism, Leninism, Stalinism and the Communist International, and the Communist Party of the United States, in-

cluding the objective of overthrowing the government of the United States of America by force and violence at the earliest time circumstances permit, and during all of the times above mentioned defendant felt and owed his entire loyalty and allegiance to the Communist Party, the Communist International and the Union of Soviet Socialist Republics, and at the time the defendant took the oath of renunciation and allegiance, as required by law in order to become a naturalized citizen of the United States of America, the defendant had no intention of renouncing his allegiance to Soviet Russia or to his native Hungary, and had no intention of giving any of his allegiance to the United States of America.

IX

As the result of the affirmative, fraudulent, intentional and willful misrepresentations by the defendant, as above found, the Immigration and Naturalization Service and the court were foreclosed from making any further investigation or any investigation which would have revealed the defendant's record of arrests, his Communist Party membership, and his poor moral character, and as a result of said misrepresentations the Immigration and Naturalization Service and the court did not make a further investigation as to whether defendant had all of the qualifications for citizenship required by the Nationality Act of 1906, as amended; and as a result thereof said Immigration and Naturalization Service made a recommendation to the court that said Petition for Naturalization be granted, and said court granted said Petition for Naturalization.

X

Before the filing of this Amended Complaint, an affidavit was executed by Maurice A. Roberts, an attorney of the

Immigration and Naturalization Service, United States Department of Justice, showing good and sufficient cause for the institution of this proceeding under, and as required by, the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1451(a)] to set aside and cancel the naturalization of said defendant, Peter Chaunt, as having been procured by concealment of material facts and by willful misrepresentation; a copy of said affidavit was attached to the original Complaint herein and to the Second Amended Complaint herein, on which the action was tried, marked EXHIBIT "A", and the original of said affidavit was introduced in evidence as Plaintiff's Exhibit 36.

CONCLUSIONS OF LAW

I

This Court has jurisdiction of plaintiff's First and Second Causes of Action as alleged in plaintiff's Second Amended Complaint under the provisions of Section 340(a) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1451(a)].

II

The naturalization of the defendant was procured by concealment of material facts within the meaning of Section 340(a) of the Immigration and Nationality Act of 1952.

III

The naturalization of the defendant was procured by willful misrepresentation within the meaning of Section 340(a) of the Immigration and Nationality Act of 1952.

IV

The order of the United States District Court for the Eastern District of New York at Brooklyn New York,

dated November 28, 1940, admitting the defendant to citizenship, and the Certificate of Naturalization No. 4785200 issued by said court on the 28th day of November, 1940, were procured by concealment of material facts and by willful misrepresentations and the naturalization of the defendant was induced by the defendant's fraud and said naturalization is therefore rendered nugatory by the defendant's fraud.

V

The allegations contained in both the First and Second Causes of Action of plaintiff's Second Amended Complaint

[Mathes, J.] , as hereinabove found, have been sustained [^] by unequivocal, clear and convincing evidence beyond all reasonable doubt, and the prayer of said Second Amended Complaint should be granted and judgment in favor of the plaintiff and against the defendant as prayed for in said Second Amended Complaint should be entered accordingly, adjudging that the order of the court admitting defendant to citizenship be revoked and set aside; that all official documents evidencing citizenship be cancelled; that upon this judgment becoming final the defendant shall be required to surrender and deliver up his Certificate of Naturalization No. 478522 to the Clerk of the Court for cancellation; and that defendant be forever restrained and enjoined from setting up or claiming any rights, privileges or advantages whatsoever under said order or under any official document evidencing citizenship issued by virtue of the aforesaid order.

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the order of the United States District Court for the Eastern District of New York at Brooklyn, New York, made on November 28, 1950, admitting the defendant, Peter Chaunt, to citizenship of United States of America, be and the same is hereby revoked, set aside and cancelled.

2. The Certificate of Naturalization No. 4785200 issued to the defendant, Peter Chaunt, by the Clerk of the United States District Court for the Eastern District of New York at Brooklyn, New York, be and the same is hereby revoked, set aside and cancelled.

3. That a certified copy of this Judgment shall be transmitted by the Clerk of this Court to the United States District Court for the Eastern District of New York at Brooklyn, New York, which originally issued the said Certificate of Naturalization, and the Clerk of the said United States District Court for the Eastern District of New York, upon receipt of the said certified copy of this Judgment, shall enter the same of record and cancel said original certificate of naturalization upon the records of said court and notify the Attorney General of the entry of such order and of such cancellation.

4. That upon this judgment becoming final the defendant, Peter Chaunt, shall surrender his copy of said Certificate of Naturalization No. 4785200 to the Clerk of this Court for cancellation.

5. That the defendant, Peter Chaunt, upon this judgment becoming final, shall be thereafter enjoined from claiming or exercising any rights or privileges of citizenship granted by said Certificate of Naturalization No. 4785200 or said order admitting said defendant, Peter Chaunt, to citizenship.

Dated: April 20 1957.

(Sgd.) WM. C. MATHES
United States District Judge.

Entered and Docketed April 24, 1957. Clerk U. S. District Ct. Southern District of Calif., by C. A. Simmons, Deputy Clerk.

Filed Apr. 22, 1957, Clerk, U. S. District Court Southern District of California, by C. A. Simmons, Deputy Clerk.

Lodged Apr. 12, 1957, Clerk, U. S. District Court Southern District of California, by C. A. Simmons, Deputy Clerk.

APPENDIX F.

U. S. v. PETER CHAUNT, No. 15907-WM

LIST OF EXHIBITS

<u>Exhibit's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Trans- script</u>
	List of Exhibits			
1-A	Certd. copy — Complaint, City of New Haven, Conn. 7-30-29 Warrant of arrest under Ord. 729—Disposi- tion: Not guilty. Dis- charged.	X	X	484
1-B	Certd. copy — Complaint, City of New Haven, Conn. 12-21-29 Warrant of arrest under p. 609 Charter & Ord. — Not Guilty — De- murrer filed; over-ruled.	X	X	484
1-C	Certd. copy of Demurrer to complaint under Ex. B dated 12-27-29.	X	X	484
1-D	Certd. copy of Complaint New Haven, Conn.—dated Mar. 11, 1930 City Ct. for Breach of Peace—Found Guilty \$25.00 fine.	X	X	484
1-E	Appeal of Ju. in Ex. D to: Crim. Court of Common Pleas—Nolled Apr. 7, 1930.	X	X	484
2-A	Naturalization forms for Peter Chaunt as follows: Preliminary Form for Peti- tion for Naturalization	X	X	35-42, 62, 96A 112, 206

<u>Govt's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Tran- script</u>
2-B	Second page of Preliminary Form for Petition for Naturalization.	X	X	35-42 59-60 96A, 62 112, 20
2-C	Statement of Facts; attached to Preliminary Form for Petition for Naturalization.	X	X	36, 42-46 96A, 11
2-D	Instructions: Part of Preliminary Form for Petition for Naturalization.	X	X	36, 42-46 96A, 11
2-E	Additional information re residence—Part of Preliminary Form for Petition for Naturalization.	X	X	36-42 11.
2-F	Petition for Naturalization (Triplicate).	X	X	13-35, 112, 20
2-G	Second page of (2-F)—Triplicate copy of Petition for Naturalization.	X	X	13-35, 52-59, 61-67, 71-72, 97-98, 112, 20
2-H	Duplicate copy of Petition with original signature of Chaunt & witness.	X	X	47, 11
2-I	Certificate of Admission of Alien.	X	X	47, 73, 11
2-J	Certd. copies of : Certificate of Arrival; original Petition for Naturalization; Oath of Allegiance.	X	X	46, 11

<u>Govt's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Trans- script</u>
3	Duplicate of photo of Peter Chaunt taken from Certificate of Naturalization.			
4	Communist Party of U. S. A. Membership book for Alex Feher, signed by Peter Chaunt.	X	X	193-197, 301, 327, 535
5	Communist Party of U. S. Membership book of Frank Hunter, signed by Peter Chaunt.	X	X	193-197, 326-327, 535
6	Communist Party of U. S. A. Membership Book of Wm. Haines, signed by Peter Chaunt.	X	X	194-197, 327, 535
7	Communist Party of U. S. A. Membership book of John Wren, signed by Peter Chaunt.	X	X	194-197, 327, 535
8	Print from Microfilm of page 2, Daily Worker for Wed. Jan. 22, 1930 w/article "Lenin Memorial Meets" (see col. 3, last paragraph).	X	X	414, 415, 421, 425
9	Microfilm print page 3, Daily Worker, Tues., June 12, 1934 w/article "800 St. Louis Jobless (see paragraph 5).	X	X	414

<u>Govt's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Trans- script</u>
10	Microfilm print, page 1— Daily Worker, Thurs., May 17, 1934 w/article "Thugs Kidnap, Beat Packers (last paragraph).	X	X	410-4
11	Microfilm print, page 3— Daily Worker, Fr. Jan. 23, 1931, w/article "Little Rock, Ark. Active in Sec- tion" (see par. 4—"Dist. 4 scores indifference").	X	X	411-4
12	Microfilm print, page 3— Daily Worker, Sat. June 21, 1930 w/article "For Of- fensive Strategy" by Peter Chaunt, Dist. Organizer, Dist. 15.	X	X	409,41
13	Microfilm print—pp. 1 & 3, Daily Worker—Mond. Feb. 10, 1930 w/article "Jobless Rally in Conn." (par. 3, p. 1; last paragraph p. 3).	X	X	413-414 429, 432-43.
14	Original of Duplicate Cer- tificate of Naturalization No. 4785200 with photo & signature of Peter Chaunt.	X	X	72-73, 192-197 111
15	3-5-55 Letter New Haven Prosecutor re City Ord. 729 of 1929 and page 609 of New Haven Charter & Ordinance.	X	X	48

<u>Govt's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Trans- script</u>
5	Pamphlet—The Communist Party In Action by Alex Bittelman. 2d ptg. Sept., 1932.	X	X	402, 404
7	Leninism by Joseph Stalin—Vol. 19—Little Lenin Library.	X	X	364, 353, 516
8	Foundations of Leninism by Joseph Stalin—vol. 18—Little Lenin Library.	X	X	347, 364, 369-370, 353
9	The Communist Party—A Manual on Organization by J. Peters.	X	X	369-370, 402, 404
0	Why Communism: Plain Talks on Vital Problems by M. J. Olgin. Pub. Dec. '33.	X	X	404
1	The Struggle Against Imperialist War & The Tasks of the Communists—Resolutions Sixth World Congress.	X	X	404
2	The Way Out—A Program for Am. Labor—Prin. Resolutions Adopted by 8th Convention—in 1934—Pub. 1934.			403
3	Stalin's Speeches On The American Communist Party Pub. May, 1929.	X	X	402, 404

<u>Govt's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Trans- script</u>
24	Program of The Communist International—pub. 1936.	X	X	404
25	The Communist Manifesto by Marx & Engels.	X	X	404
26	The Twenty-One Conditions of Admission into the Communist International by O. Piatnisky.	X	X	394, 401 395
27	State & Revolution by V. I. Lenin—Little Lenin Lib.—pub. 1932.	X	X	347, 364-369, 35
28	Left-Wing Communism, an Infantile Disorder by V. I. Lenin.	X	X	349, 364-371, 35
29	Thesis & Resolutions of 7th Natl. Convention C. P. Mar.-April, 1930.	X		403
30	Resolutions of 9th Convention of C. P. June, 1936.	X	X	404
31	Resolutions of 10th Natl. Convention C. P. May, 1938.	X	X	301, 40
32	1938 Constitution of C. P. as adopted at 10th Natl. Convention.	X	X	402, 40
33	1938 Constitution of C. P. as amended in 1940.	X	X	403-40
34	Stalin — Foundations of Leninism—On the Problem of Leninism.	X	X	351, 35

<u>Exhibitor's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page in Transcript</u>
5	Pre-Trial Stipulation.	X	X	11, 543
6	Affidavit Showing Good cause, filed Oct. 1, 1953 & attached to original complaint.	X	X	68-69, 99
6-a	Original Affidavit of Maurice Roberts showing good cause.	X	X	100
7	Newspaper "Columbian Missourian" 7-3-33	X	X	216-218
8	Original Statement of Wit. Kalke—20 pp. & attached Statements: Ex. A—2 pp. & Ex. B—6 pp., submitted to Court in camera.	X	Sealed & not made available to defendant.	
8-a	Photostat of Ex. 38 with names of all persons excised.	X	20-page statement & 2-page Ex. A as excised, made available to defendant. Ex. B sealed & not disclosed to defendant.	

LIST OF DEFENDANT'S EXHIBITS.

<u>Deft's</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Page: Transcript</u>
A	"The Communist Trials and the American Tradition, Expert Testimony in Force and Violence," by John Summerville, Ph.D.	X	X	511
A-1	Letter by Dr. Summerville with reference to Exhibit A.	X	X	315
B	Deposition of Calvin Deringer taken February 7, 1956.	X	X	83, 95-9
C	Affidavit of Kenneth Kalke.	X		137
D	American Magazine for April, 1940.	X		314, 3
E	Sworn Statement of Manning Johnson dated Oct. 9, 1950.	X	X portion of statement received in evidence.	5

No. 15843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S REPLY BRIEF.

JOHN W. PORTER,

1344 Garnet Street,
San Diego 9, California,

Attorney for Appellant.

FILED

APR - 7 1959

PAUL P. O'BRIEN, CLERK

TABLE OF AUTHORITIES CITED

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Yates v. United States, 354 U. S. 298.....	2

STATUTES	
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United States Constitution, Fourteenth Amendment.....	3

No. 15843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER CHAUNT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S REPLY BRIEF.

I.

(1) The Government, it appears, does not begin to grasp the implications of *Nowak* and *Maisenberg*.^{*} Appellant's concealment of membership in the Communist Party as found below lends no support to the judgment unless the membership was accomplished by disaffection toward the United States. For, contrary to the findings (Appx. E, p. 4, par. VI)^{**} it did not "violate the requirements" of the Nationality Act of 1906, which was not concerned with the Communist Party. Nor would disclosure of membership have answered whether Appellant was "attached to the principles of the Constitution." That could be gauged not by such a mechanical test, but by questions about his attitude toward Con-

^{*}*Nowak v. United States*, 356 U. S. 660; *Maisenberg v. United States*, 356 U. S. 670.

^{**}References to appendices are, of course, to those in the Government's brief.

stitutional and other principles of government. (Cf. *Maisenberg v. United States*, *supra*, at p. 673.) Those questions were not asked.

(2) Moreover, there is no finding as to *how* appellant concealed his membership. Presumably we are to understand that it was, in part, by answering that he belonged to the "Fraternal Benefit Society of Internation (*sic*) Workers Order." [Govt. Ex. 2-G, Appx. B.] But the testimony shows that the question was ambiguous, especially as to time [R. 33-34]; organizations belonged to *when*? The other answer is the "no" to the question, "Do you believe in Communism, Fascism or Nazism?" [Finding V, Appx. E, pp. 6-7.] This too is totally uncertain. (*Nowak v. United States*, *supra*.)

(3) The findings of non-attachment, in the teeth of *Maisenberg*, are made expressly "by reason of defendant's membership in, and his knowledge of the nature and principles of the Communist Party" and no other. [Finding V, Appx. E, p. 7.] Both the wording of the finding (lifted from the complaint), and the character of the evidence, make it obvious that the "membership" carries the "knowledge" with it; knowledge in effect is presumed or inferred from the fact, the nature, of the membership. But this does not do, under *Nowak* and *Maisenberg* or, for that matter, *Schneiderman* and *Yates*.*

It is true here, as it was in *Maisenberg*, that there is no evidence of

"any expression from the defendant with regard to his own state of mind at and prior to the time he took the oath of naturalization." (Govt. Br. p. 22.)

**Schneiderman v. United States*, 320 U. S. 118; *Yates v. United States*, 354 U. S. 298.

Neither in that case nor in this was there evidence that the defendant *himself* “ever advocated revolutionary action or that (he) was aware that the Party proposed to take such action.”* Yet without proof the judgment falls.

The findings [VI, VII and VIII, Appx E. pp. 8-10] seek to surmount this gap by extension. From the premise of membership they leap to elaborate conclusions of non-attachment. But it is a futile process. For, search the record from end to end, there is nothing to support all of this but the “fact that (Chaunt) was an active member and functionary in the party . . .” (356 U. S. 660, 665-666.) That, despite the Government’s despairing questions (Br. p. 31) is not enough.

II.

(4) As to the arrests, the Government believes (Br. p. 35) that the burden of proving their illegality should be borne by the appellant. But this is a *denaturalization* case; the burdens sit heavy and may not be shifted. And even though a presumption of validity might rescue the Government if it alleged arrests for burglary or rape, none arises here. For, as we showed in our opening brief (p. 9), at least two of these were made under ordinances which on their face, flout the First and Fourteenth Amendments.

(5) We agree with the Government (p. 39) that in passing on an applicant for citizenship “his *conduct* is the crucial factor.” (Their emphasis.) Precisely. The fact that he may have been falsely arrested—once, twice or thrice—sheds absolutely no light on the subject, tells nothing whatsoever about *his* conduct. Nor is the case

*356 U. S. 670, 673.

better for the Government's view if it should be that the arrests occurred in connection with, or *because of*, the appellant's exercise of rights secured by the First Amendment.

III.

(6) The fact that the Supreme Court has never applied the doctrine of *res judicata* to denaturalization judgments in other cases seems slight reason against its application in this case. At least it is of feather weight against recognition that this is the sort of case in which the defense would—and should—apply.

The Government fears that to adopt it here would put a premium on perjury in citizenship proceedings. (Br. p. 68.) But that danger is no less present in other cases. Under our law protection against perjury is furnished by the criminal codes and by the probing search for truth afforded by cross-examination in an adversary setting. It has never been thought to lie in paper judgments, readily overturned by any breadth of doubt about the trial. Decrees of naturalization, like other status judgments (*Schneiderman v. United States, supra*) especially require finality. It is paradoxical to deny them the means of assuring it.

Respectfully submitted,

JOHN W. PORTER,

Attorney for Appellant.

See also: Vol. 3083

No. 15,873✓

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES,

Appellant,

vs.

E. B. HOUGHAM, et al.,

Appellees.

**On Appeal from the United States District Court for
the Southern District of California,
Northern Division.**

REPLY TO PETITION FOR REHEARING.

CONRON, HEARD & JAMES,
Suite 7, Habersfelde Building Arcade,
Bakersfield, California,
Attorneys for Appellees.

FILED

SEP 16 1953

PAUL P. GIBBLEN, Clerk



No. 15,873

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES,

VS.

E. B. HOUGHAM, et al.,

Appellant,

Appellees.

**On Appeal from the United States District Court for
the Southern District of California,
Northern Division.**

REPLY TO PETITION FOR REHEARING.

*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

We respectfully suggest that the Petition for Rehearing of Appellant should be denied. The opinion is not based upon a ground which was neither briefed nor argued by either party; on the contrary, the position of the Government is argued on page 15 of its brief and again on page 20, and the Court adopted the theory of Appellant in its opinion, where the Court states:

“The amount of recovery prayed for had no effect upon the substance of the claim. If a cause of action was stated, based upon the statute, the

amount of recovery would be based upon the proof.

and

“At the end of the trial the Government would be entitled to that which the Court found was established by the evidence.”

Appellees argued the matter from the premise that an election was improper and not applicable in its brief on pages 23 through 26 inclusive, and pointed out that under the allegations of the First Amended Complaint, and under the proof submitted at the trial, there was no proof of, “Twice the consideration agreed to be given by such person to the United States.”

The opinion supports the trial Court’s version that the evidence offered did not support a recovery under the second alternative of the Act. It follows that the major premise and the entire Petition must fall, because the Court is making no selection or election of remedies to the exclusion of the Government. The Court has merely found that the Government has failed to present a case which would justify a recovery under the second alternative.

It is submitted that the Supreme Court’s denial of certiorari in the case of *Koller v. U. S.* in no way effects the reasoning of the Court that a choice of remedies willy nilly, regardless of the evidence, would provide a criminal penalty. The comments of the Court in this regard are not germane to the basis of the opinion which rejected the statute of limitations argument.

The opinion does not state, as the Petition suggests, that the conclusion of the Court was in any way effected by the fact that no actual damages were proven, nor does it follow that to admit some theoretical rather than monetary damage, would in any way change the result. The reasoning of the Government on page 9 of its Petition is entirely fallacious for the Surplus Properties Act allows sales, not only for cash, but on credit, on bids, on contract, and on numerous situations where the transaction at some time or stage had an executory covenant where a sum of money was agreed to be paid. At any rate, had Congress intended to achieve the result sought by the Government, it could have done so by appropriate language.

Dated, Bakersfield, California,

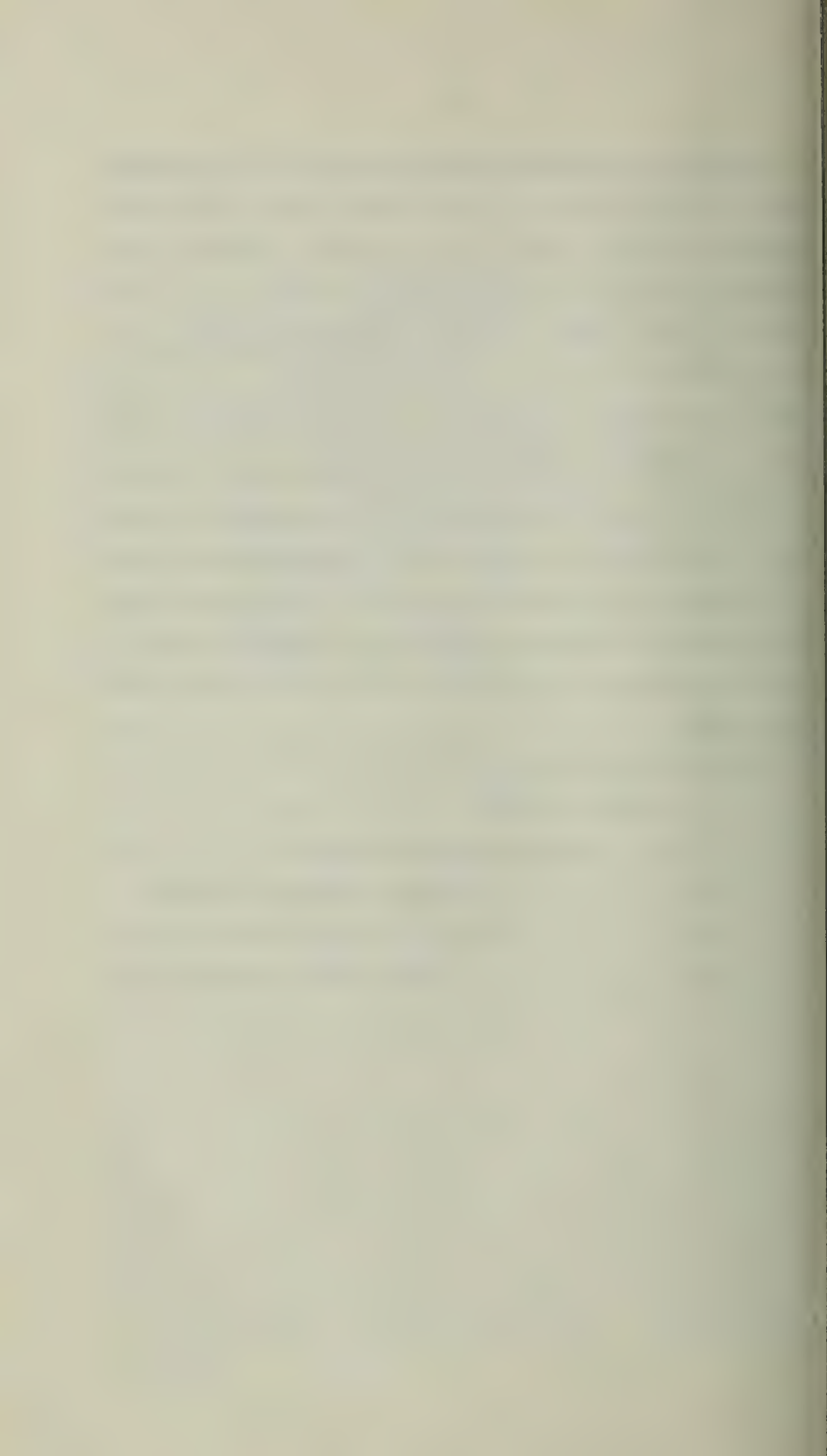
May 6, 1959.

Respectfully submitted,

CONRON, HEARD & JAMES,

By CALVIN H. CONRON, JR.,

Attorneys for Appellees.



No. 15873

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.
SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION.

**RESPONSE TO APPELLEES' REPLY TO PETITION FOR
REHEARING**

GEORGE COCHRAN DOUB,
Assistant Attorney General,

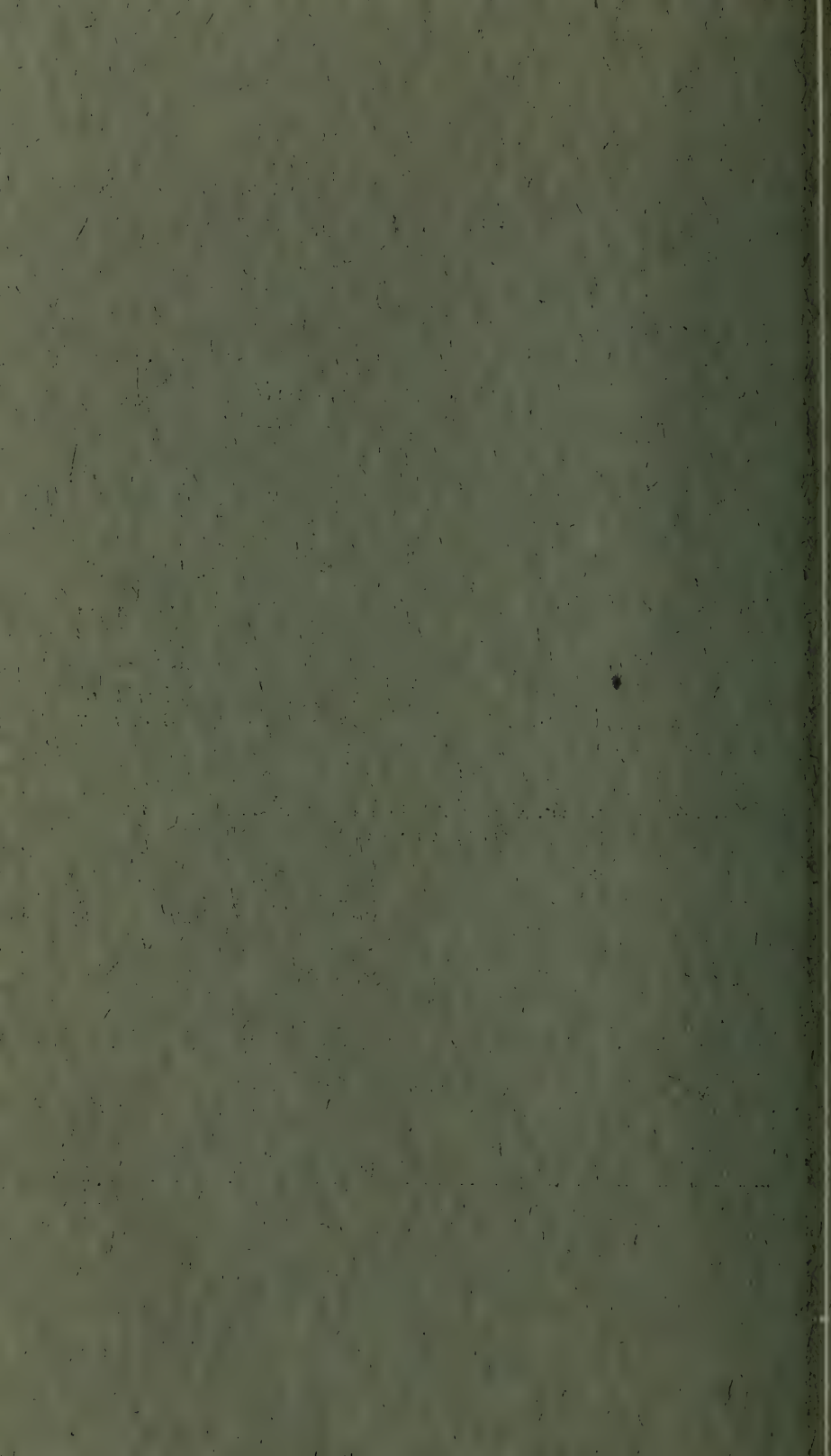
LAUGHLIN E. WATERS,
United States Attorney,

MORTON HOLLANDER,
HERSHEL SHANKS,
*Attorneys, Department of Justice,
Washington 25, D.C.*

FILED

MAY 16 1959

PAUL P. O'BRIEN, CLERK



In the United States Court of Appeals for the Ninth Circuit

No. 15873

UNITED STATES OF AMERICA, APPELLANT

v.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E.
SCHWARTZE AND HARLAN L. MCFARLAND, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION*

RESPONSE TO APPELLEES' REPLY TO PETITION FOR REHEARING

In appellees' reply to the Government's petition for rehearing, they suggest that the decision of this Court may be justified on the ground that "the Court has merely found that the Government has failed to present a case which would justify a recovery under the second alternative".

1. This Court affirmed the district court's finding of fraud.

2. In its second amended complaint the Government alleged in detail the amount paid for each of the fraudulently obtained vehicles (R. 58-61, 64-65, 68-71). The Government proved the amount of these purchases by the introduction into evidence of the ac-

tual sales slips (R. 149-166). The district court specifically found that the vehicles had been purchased as described in the second amended complaint (R. 101-110, 112-113).

If, as appellees now contend, this Court intends to hold no more than that "the Government has failed to present a case which would justify recovery under the second alternative", the Government is at least entitled to know why this is so. Rather, as the Court well knows, the basis of the decision is the Court's holding that the choice of remedy is the Court's rather than the Government's. This is the issue to which our petition for rehearing was directed. No attempt has been made by the appellees to defend this basis of the decision. Instead they now attempt to justify the Court's opinion on a basis which is entirely without foundation and on which the Court did not rest.

Respectfully submitted.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
 LAUGHLIN E. WATERS,
United States Attorney,
 MORTON HOLLANDER,
 HERSHEL SHANKS,
Attorneys.

MAY 1959.

No. 15873

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES, APPELLANT,

v.

E. B. HOUGHAM, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION

PETITION FOR REHEARING

GEORGE COCHRAN DOUB,
Assistant Attorney General,

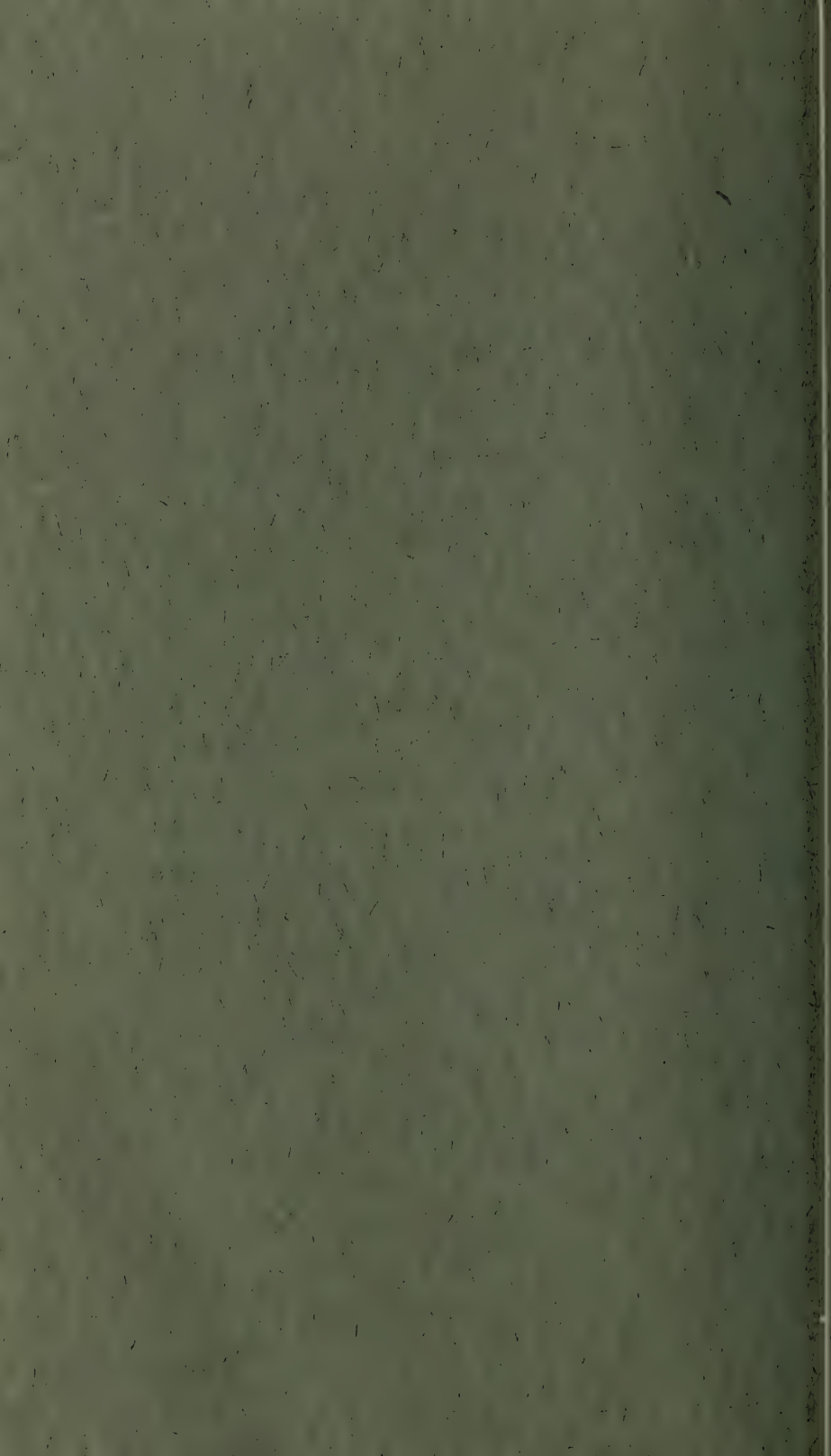
LAUGHLIN E. WATERS,
United States Attorney,

MORTON HOLLANDER,
HERSHEL SHANKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

FILED

MAY - 1 1959

PAUL R. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15873

UNITED STATES, APPELLANT,

v.

E. B. HOUGHAM, ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTH-
ERN DIVISION*

PETITION FOR REHEARING

Pursuant to Rule 23 of this Court, the United States respectfully petitions for a rehearing on its appeal¹ in the above-entitled case. The judgment of this Court was entered on April 14, 1959.

The basis for the petition is that this Court's ruling against the Government is based on a ground which was neither briefed nor argued by either party, and which we believe to be unquestionably wrong.

¹ The defendants in the court below also appealed. This Court's affirmance of the judgment of the district court as to that appeal is plainly correct and foreshadowed an identical ruling by the Supreme Court on April 20, 1959 on the very same issue. *Koller v. United States*, — U.S. —, 27 U.S. Law Week 4280.

1. The only issue raised by the Government in its appeal was whether the Government was limited in its recovery to damages under the first statutory alternative of Section 26(b) of the Surplus Property Act of 1944² because of the fact that the ad damnum in its initial complaint sought relief under the first statutory alternative. The district court had ruled that

* * * since the United States sought damages under the provisions of Section 26(b)(1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26(b)(2), or otherwise elect to receive liquidated damages under the provisions of Section 26(b)(2), * * * (R. 117).

On appeal, the Government contended only that this ruling with respect to an election of remedies was erroneous and that, having proved its case, it was entitled to elect to recover under the second statutory alternative.

In its opinion this Court appears to agree with the Government's contention that the Government was not foreclosed from seeking relief under the second statutory alternative because of an earlier election of remedies. This Court stated:

* * * The amount of recovery prayed for had no effect upon substance of the claim. If a cause of action was stated, based upon the statute, the amount of recovery would be based upon the

² 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1661, *et seq.*

proof. The statute gave the United States three different measures of damages. Under the Federal Rules of Civil Procedure, at the end of the trial the government would be entitled to that which the court found was established by the evidence.

* * * * *

* * * Based upon the proof at the end of the case, the government could recover damages in one of three forms. * * *

However, this Court went on to hold that the choice as to which of the three remedies was to be applied was to be made, not by the Government, but by the court:

Since then these provisos give liquidated damages in various forms, the trial court had the power to give that form of relief to which he believed the government was entitled. * * *

Throughout this case both parties have assumed that, if the Government was not foreclosed by the prayer for relief in its initial complaint, the Government, and not the court, was entitled to decide which statutory remedy would be applied. Nowhere have the defendants argued that the choice of statutory remedy is a question within the trial court's discretion.

2. We believe that the court's determination of this question—neither briefed nor argued until this time—is erroneous; that it conflicts with the plain words of the statute, with the legislative history of Section 26, and with the consistent administration of this statute for over fifteen years.

Section 26(b) of the Act, containing the three alternative statutory remedies, specifically states that the

Government may recover under the second or third alternatives “* * * if the *United States* shall so elect * * *” [emphasis supplied]. Congress did not state that the second and third alternatives were to be applied where, in the court’s discretion, either of these remedies was considered appropriate. Instead, the determination was specifically delegated to the Government.

This Court in its opinion suggests that the quoted language was inserted to show the noncumulative and alternative nature of the three remedies. However, the alternative nature of the remedies is clearly and indisputably demonstrated not only by the nature of the remedies themselves but by the fact that the three remedies are connected in the statute by the disjunctive “or”. In the face of this plain and incontestable indication that the remedies are alternative and noncumulative, there was no need for additional surplusage subtly to imply that fact. On the contrary, the quoted language was inserted, as the plain meaning of the words demonstrates, to indicate that the choice of remedy is the Government’s choice.

That the choice of remedy is the Government’s, and not the court’s, is further demonstrated by the legislative history of Section 26(b). As the Senate Report on the bill which became the Surplus Property Act states, “The *United States* is given the option of electing among three different measures of damages” [emphasis supplied], S. Rept. 1057, 78th Cong., 2d Sess., p. 14. It would be difficult for Congress to have expressed itself more clearly.

In the fifteen years since the Act has been passed, the Government has exercised this option in every one of the thousands of fraud cases instituted under this Act.

This is the first time that its right to do so has been questioned. Accordingly, the question has never been discussed specifically in court opinions. Nevertheless, in numerous judicial discussions of the Surplus Property Act, courts have reflected their understanding that the choice of remedies under the statute was the Government's choice. For example, in the leading case of *Rex Trailer Co. v. United States*, 350 U.S. 148, 150, the Supreme Court noted that, "The United States limited itself to the recovery of the sum of \$2,000 for each of the five overt acts alleged in its complaint". In *United States v. Doman*, 255 F. 2d 865, 869 (C.A. 3), affirmed *sub nom. Koller v. United States*, — U.S. —, 27 U.S. Law Week 4280 (decided April 20, 1959), the Third Circuit stated that, "the *United States* was to have the option of selecting as its remedy any one of the three different measures of damages" [emphasis supplied]. The holding in *Bernstein v. United States*, 256 F. 2d 697 (C.A. 10), also reflects that court's understanding that the Government was to have its, and not the court's, choice of remedy. There, as here, the district court had ruled that the Government had elected its choice of remedy by filing its initial complaint. The Tenth Circuit reversed this ruling and ordered payment to the Government on a larger basis than that permitted by the district court. The Tenth Circuit did not remand the case to the lower court to permit it to apply that remedy which in its discretion seemed most appropriate.

3. In its opinion here, this Court reasoned that if the Government were permitted to choose the applicable remedy, the proviso would constitute "a criminal penalty". However, any doubt as to the nature of the

remedies provided by 26(b) has now been resolved by the Supreme Court's decision in *Koller v. United States*, — U.S. —, 27 U.S. Law Week 4280 (decided April 20, 1959). That these remedies are alternatives available to the Government, that one is a multiple of the actual damage suffered by the Government, that another is for a fixed sum for each violation, that another is for a multiple of the consideration paid for the fraudulently-obtained property—none of these facts affects the conclusion that this entire and elaborate structure is intended as liquidated damages to insure “the government complete indemnity for the injuries done it”, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549. “The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress”, *United States ex rel. Marcus v. Hess*, *supra* at 552. *Koller v. United States*, *supra*; *Rex Trailer Co. v. United States*, *supra*. That the Government may choose any one of the liquidated damage provisions under which to recover is simply to insure that the Government will be made whole. Allowing it to do so does not make the provision penal.

This Court appears to have proceeded on the assumption that recovery under the first statutory alternative is more appropriate here than the second alternative because of the fact that the Government has proved no actual damages. However, if this reasoning were applied to all cases, the second statutory alternative would never be used for if it is inappropriate where the Government proves no actual damages, it is equally inappropriate where the Government proves actual damages and may recover a multiple thereof under the first statutory alternative. The plain fact is that the Government's failure to prove any actual damages has no

relevance to the appropriateness of any of the statutory alternatives. Application of the second statutory alternative does not depend on proof of actual damages. To entitle the Government to recovery under the second alternative, the Government must establish, in addition to fraud, *only* the amount of the consideration.

Moreover, it should not pass without mention that the Government's failure to prove actual damages here does not mean that the Government has not been in fact damaged. As the Supreme Court noted in *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-154:

It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances. * * *

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. But the Government was *not* willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions. In these circumstances, petitioners' fraudulent misrepresentations had the effect not only of inducing the Government to sell the vehicles to a person with whom it had no in-

tention of dealing, but also of selling the vehicles at lower than market prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act.

In addition, by fraudulently procuring the vehicles, petitioners reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some Government agency which was entitled to priority may very well have been compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that Government agencies have top priority—after veterans—to guard against precisely such a result so far as other purchasers were concerned.³

Moreover, the Government may well have suffered actual damage here which it could not prove. The Government is not always able to establish the market value of limitless articles of fraudulently-obtained surplus property as of the time it was sold, nor is it always able to determine the enormous profits often made on resale of this property. In another case in which the Government was not able to establish the amount of its actual damages, the Supreme Court stated that, "It seems quite probable that there is also an element of unjust enrichment to the Rex Trailer

³ S. Rept. 1142, 79th Cong., 2d Sess., p. 3, lists the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

Company from its fraudulent purchases. The record is silent on this point and we have not considered it in arriving at our decision, but the fact that Rex was willing to resort to fraud to purchase the vehicles at the veteran's price strongly suggests an unfair gain from the purchases." *Rex Trailer Co. v. United States*, 350 U.S. 148, 153, n. 6. Moreover, experience in other cases of this type indicates the vast fortunes that are sometimes made through veterans-front surplus property frauds. For example, in one recent case (*Bernstein v. United States*, 256 F. 2d 697 (C.A. 10)) the defendant paid less than \$20,000 for surplus property heaters, less than one-fourth the amount paid for the property in this case, and later resold them at over \$168,000.

This Court also expressed the view that the second statutory alternative would be more appropriately applied to a case in which the property had not passed, but a consideration had been agreed upon. Such a case most likely can never arise. If the second statutory alternative were only applied in cases where the property has not passed, it would probably be nugatory and Congress would have performed a vain act by including it in the statute. For payment of the full purchase price and delivery at these surplus property sales occur almost simultaneously. For example, it will be noted that in this case it was necessary for the veterans to have cash or cashiers' checks with them at the time of the purchase. Moreover, Congress recognized as "clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war", S. Rept. 1057, 78th Cong., 2d Sess., p. 14. In these circumstances, it

is inconceivable that Congress would include a remedy applicable only in cases where the fraudulently-obtained property has not passed.

For the above reasons, we submit that the petition for rehearing should be granted. In accordance with the last paragraph of Rule 23 of this Court, the Government suggests that the case be reheard en banc.

Respectfully submitted,

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APRIL, 1959.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

HERSHEL SHANKS,
Attorney,
Department of Justice.

No. 15886.

IN THE

*See also
Vol. 3083*

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIXIE TANK & BRIDGE Co., a corporation,

Appellant,

vs.

COUNTY OF ORANGE, a County of the State of California,
and WILLIS H. WARNER,

Appellees.

PETITION FOR REHEARING.

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No. 15886.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIXIE TANK & BRIDGE Co., a corporation,

Appellant,

vs.

COUNTY OF ORANGE, a County of the State of California,
and WILLIS H. WARNER,

Appellees.

PETITION FOR REHEARING.

To the Honorable Stephens, Chambers and Barnes, Circuit Judges:

Pursuant to Rule 23, Rules of the Ninth Circuit, this Petition for Rehearing is respectfully submitted. It is certified by counsel that in his judgment it is well founded and that it is not interposed for delay.

The rehearing is sought because the appellees believe there are incorrect statements of law and fact in the opinion as rendered and filed March 4, 1959.

I.

Error That Mr. Warner Might Be Liable.

The first and most important error we believe which is contained in the opinion is that the defendant Willis Warner as an individual might be liable and that this liability raises a genuine issue of fact. The Court concedes the general rule in footnote 5 that officers are *not* personally liable under the contracts unless the contract shows that the officer clearly intended to assume personal liability. Or as stated in the case of *New York-Charleston Steamship Company v. Harbison* (2d Cir.), 16 Fed. 688—one of the cases cited by this Court in that footnote—at page 690, that “Where it is sought to charge him with a personal responsibility, the facts and circumstances ought to be such as to show clearly that both parties acted upon the assumption that a personal liability was intended” or, to quote from another case used by the Court herein in that same footnote, which again, is representative of the general law on the subject, the *Sims Printing Company v. Kerby* case (106 P. 2d 197), at page 200, sums up the situation as follows:

“We consider next the liability of defendant in his private capacity. There are three factual situations which may have existed. Both plaintiff and defendant may have believed in good faith, knowing all the facts of the case, that the latter had a right as a matter of law to enter into the contract on behalf of the state. Under the rule above stated, if both parties acted in good faith, with a full knowledge of the facts but were mistaken as to the law, there is no personal liability of the defendant. Or, it may be that both parties acted with full knowledge of the facts but in bad faith, knowing the law to be against them, but believing that they could ‘put over something’ on the auditor. In such a case, they are in

pari delicto, and plaintiff may not recover from defendant. On the other hand, it may be that defendant deliberately and intentionally misled plaintiff as to the fact that part of the copy covered the 1936 measures, and the plaintiff printed that part of the pamphlet relying upon the statements or acts of defendant, and believing in good faith that **what it** printed was part of the 1938 measures. In the latter case, an action for fraud would lie against defendant."

The appellant herein never once has alleged a fact, either by his complaint in any amendment or in his affidavit to support his own motion for summary judgment, that Mr. Warner either intended to be personally bound or acted upon the assumption that he was personally bound or that there were any facts or circumstances to show personal undertaking of liability. Rules 8 and 9, Federal Rules of Civil Procedure, require a statement of the specific grounds upon which relief is sought, and fraud must be specially pleaded. All the appellant can do is quote the alleged warranty and allege liability thereon. No case cited has ever held a public officer liable for an undertaking in his official capacity. The case of *Dawson v. Martin*, 150 Cal. App. 2d 379 at 382, 309 P. 2d 915 at 917, was cited by these appellees in their brief at page 4 as a California holding specifically on the point that a member of a Board of Supervisors is *not* liable in damages for his official acts, except as such liability is prescribed by statute. The alleged warranty herein merely stated two things:

1. That Mr. Warner was "fully authorized to sign, execute and deliver" the contract; and
2. That "all legal requirements have been fully complied with."

Number 1 is fully supported by the record herein showing that in truth a Minute Order adopted by the full Board authorized Mr. Warner to sign the contract. There was no falsity about the *authorization* he had received to sign the contract and none is alleged.

Number 2 was an alleged warranty that the legal requirements for the contract were complied with. First of all, it must be conceded that in California, as elsewhere, the parties to a contract are presumed to have in mind and to know all the applicable laws pertaining to the contract, *Robertson v. Dodson*, 54 Cal. App. 2d 661 at 664, 129 P. 2d 726 at 728; *Mehlstedt v. Fugit*, 79 Cal. App. 2d 562 at 566, 180 P. 2d 777 at 779; *Monson v. Fischer*, 118 Cal. App. 503 at 516, 5 P. 2d 628 at 633; *Hays v. Bank of America*, 71 Cal. App. 2d 301 at 304, 162 P. 2d 679 at 681; *Traders and General Insurance Company v. Pacific Empire Insurance Company*, 130 Cal. App. 2d 158 at 164, 778 P. 2d 493 at 497; *Alpha Beta Food Markets, Inc. v. Retail Clerks Union Local No. 770*, 45 Cal. 2d 764 at 771, 291 P. 2d 433 at 437; even though those laws may affect the very validity of the contract, *Burke v. Meyerstein*, 94 Cal. App. 349 at 353, 271 Pac. 343 at 345; *Hales v. Snowden*, 19 Cal. App. 2d 366 at 369, 65 P. 2d 847 at 849. Second, the contract herein was a printed one on the form supplied by the Dixie Tank Company and, again, it is California as well as universal law that a contract is to be construed most strongly against the writer. *Payne v. Newval*, 155 Cal. 46 at 50, 99 Pac. 476 at 478; *Nerski v. Hammond Lbr. Co.*, 202 Cal. 643 at 645, 262 Pac. 755 at 756; *Hunt v. United Bank and Trust Co.*, 210 Cal. 108 at 116, 291 Pac. 184 at 188; *Marsh and Co. v. Tremper*, 210 Cal. 572 at 574, 292 Pac. 950 at 951; *Weil v. California Bank*, 219 Cal. 538 at 541, 27 P. 2d 904 at 905;

Pac. Lbr. Co. v. Industrial Acc. Com., 22 Cal. 2d 410 at 422, 139 P. 2d 892 at 898; *Taylor v. Hill*, 31 Cal. 2d 373 at 374, 189 P. 2d 258 at 259.

Civil Code, Section 1654, specifically provides not only this rule of construction in ordinary contracts but that in a contract between a public officer or body and a private party, it is presumed "all uncertainty was caused by the private party."

If, then, Mr. Warner's "warranty" amounts to stating that the "legal requirements" were "complied with," and both he and the appellant knew the California law regarding adoption of plans and specifications (as the section is quoted in the Court's footnote No. 2, not merely "failure to have *adequate* plans and specifications," as the Court states at page 4 of its decision herein) and the California law requiring advertisements for bids, then the appellant had as much knowledge of the facts if not more; the appellant did not bid on any such adopted plans, and could not have, for there were none; the appellant did not bid in response to any such advertisement for bids, and could not have, for there was none.

In short, the appellant knew the significant facts as well as anyone else. This appears from the face of the Complaint; the appellant never once has alleged that Mr. Warner's knowledge was any superior to appellant's.

What appellant is seeking to do, in this alternative count against Mr. Warner, is to place a seventy-five hundred dollar loss on an innocent ministerial officer who was directed by a majority of the Board of Supervisors to sign a specific contract. The judgment should be against the Board in its entirety, if anyone. Of course, this is a transparent means of escaping the palpable intent and

mandate of the Government Code making the contract void.

If the contract is void for being contrary to the law, the alleged warranty is also void. 46 Am. Jur. 305 and 483, *Sales*, Secs. 124 and 299.

II.

Error That an Emergency Can Be Found.

The trial judge had nothing before him, and there is nothing before this Court, setting forth the necessary material facts to show that an emergency existed. It was incumbent upon the appellant, in its successive amendments to its Complaint, to state the material facts upon which it sought recovery. Rule 8, Federal Rules of Civil Procedure. Only in its original Complaint did it refer to "itemization" which the County was allegedly requiring [Par. VIII; R. 9]. This allegation was dropped in the subsequent versions of the Complaint. As pointed out in this appellee's brief (p. 11), this was a reference to the emergency statute, and the County had suggested that the appellant submit a bill based upon that section. If the appellant wishes to bill the County under *that* section, it is free to do so. It is unfair to base an appellate decision on the statute when the appellant has neither attempted to bill the County under it nor brought its action under it, particularly when the reference in the first Complaint was that the *appellee* suggested it be done.

III.

Conclusion.

We submit that the decision that Mr. Warner may be found liable is most serious and that a rehearing should be granted. It is disturbing that an individual member

of a Board of Supervisors, authorized by action of the full Board to sign a specific contract, stands to lose seventy-five hundred dollars simply because the appellant's printed form included a statement that he was thus agreeing that "legal requirements" had been complied with, particularly when the appellant must have known (there is no allegation to the contrary) that the legal requirements could *not* have been.

Secondly, if the appellant seeks recovery on the emergency statute, it should bill the appellee in that manner—listing the items as required by the Code section—and ground its action thereon. It is free to do so at any time.

Counsel hereby certifies that in their judgment this petition is well founded and not interposed for delay.

Respectfully submitted,

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County Counsel,

STEPHEN K. TAMURA,
Assistant County Counsel,

and

ADRIAN KUYPER,
Assistant County Counsel,
Attorneys for Appellees.

Hearing En Banc.

Should a majority of this Court grant a rehearing, it is the suggestion of these parties that, pursuant to Rule 23, Rules of this Court, due to the seriousness of the issues herein, the case be heard by the Court *en banc*.

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and

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Attorneys for Appellees.

No. 15889 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

THE DEUTSCH COMPANY,

vs.

Respondent.

THE DEUTSCH COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On the Petition for Rehearing to Set Aside Orders of the
National Labor Relations Board.

PETITION OF THE DEUTSCH COMPANY FOR
REHEARING.

and

BRIEF OF THE DEUTSCH COMPANY.

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MAY - 7 1959

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II.

Before the Board can validly order an employer to bargain with the Union or charge the employer for refusal to bargain in violation of Sections 8(a)(1) and 8(a)(5) of the Act, the Board must establish that the employer has refused to bargain with the Union on the basis of the unit appropriate for collective bargaining purposes.....	26
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III.

The National Labor Relations Board acted arbitrarily, and in abuse of the discretion conferred upon it, contrary to the provisions to the National Labor Relations Act, the Administrative Procedure Act, and the Fifth Amendment to the United States Constitution in failing and refusing to receive evidence with regard to relevant and material facts on the appropriateness of the unit for purposes of collective bargaining, during, and after, the representation hearing, and hearings on the unfair labor charges, and this honorable court, therefore, should remand the matter to the Board to take this evidence.....	29
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IV.

The National Labor Relations Board acted arbitrarily and in the abuse of the discretion conferred upon it contrary to the provisions of the National Labor Relations Act and the Administrative Procedure Act and in violation of the rights of The Deutsch Company and its employees under the Fifth Amendment to the United States Constitution in refusing to take evidence on the schism situation in the Union which occurred after the conclusion of the hearing by the Board	35
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No. 15889
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

THE DEUTSCH COMPANY,

vs.

Respondent.

THE DEUTSCH COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION OF THE DEUTSCH COMPANY FOR
REHEARING.**

To the Honorable Chief Justice of the United States Court of Appeals for the Ninth Circuit and the Associate Justices Thereof, and to the Honorables James A. Fee, Richard H. Chambers, Stanley N. Barnes, Circuit Judges of the Said Court of Appeals:

The Deutsch Company, Petitioner and Respondent above named, respectfully petitions this Honorable Court for a rehearing on its answer to the Petition for Enforcement of an Order of the National Labor Relations Board and its Petition to Modify and Set Aside Orders of the National Labor Relations Board, and in support of this Petition represents to the Court as follows:

I.

The Deutsch Company, Petitioner-Respondent, reserves its argued position as to each of the points in its Answer

to the Petition for Enforcement and its Petition to modify and set aside the Orders of the National Labor Relations Board and to its Brief in Support thereof, but in this Petition addresses itself solely to those features of the decision and opinion wherein it believes the Honorable Court may be convinced its result is based upon:

(1) Failure to consider controlling statutes, decisions and legal principles;

(2) Overlooking relevant and material facts in the record that the National Labor Relations Board failed and refused to take testimony upon relevant and material facts;

(3) Overlooking the material question whether the Board acted arbitrarily in making its orders, without taking any testimony or receiving any evidence on material issues.

(4) The opinion is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Plankinton Packing Company*, No. 12419, April 16, 1959, 43 L. R. R. M. 2858;

(5) The case is of great precedent potential.

II.

The features of the decision and opinion of the Honorable Court upon which the foregoing grounds for this Petition are based consist of:

(1) The opinion and decision did not decide the legality of the orders of the National Labor Relations Board which carried with them an implied ruling that where the elective officers of the Union have abandoned their offices in the Union and non-elected persons of a separate Union have usurped the powers and

functions of the officers and acted without having authority and without complying with the Constitution and By-Laws of the Union, and a separate Union for which they purport to act has never been certified as the exclusive bargaining agent of any of The Deutsch Company's employees, there is a schism situation whereby the Union purportedly certified to represent the employees has no agents or officers and the Union which claims to represent the employees does not meet the description of the exclusive bargaining representative set forth in the Certification of Representations.

(2) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted contrary to the National Labor Relations Act, the Administrative Procedure Act and the Fifth Amendment to the United States Constitution in refusing to hold a hearing and take testimony on the facts involving the schism situation and involving the conflict caused by claims of two union groups to represent the employees of The Deutsch Company and by denying summarily the Motion for (1) Rehearing and Reconsideration (2) An Order Setting Aside the Decision and Direction of Election and (3) An Order Setting Aside Certification of Representatives.

(3) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted arbitrarily and contrary to the National Labor Relations Act, the Administrative Procedures Act and the United States Constitution in failing and refusing to consider or take evidence with regard to the desires of the employees to be

represented by a Union as evidenced by the secret consent election held on the agreement of the employer, the Union, and the Union members.

(4) The decision and opinion failed to decide whether the National Labor Relations Board acted arbitrarily and in abuse of the discretion conferred upon it and contrary to the National Labor Relations Act, the Administrative Procedure Act and the United States Constitution in designating as the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act a multi-plant company unit, and in rejecting the offer of evidence at the hearing on the Complaint and refusing to take evidence upon a Petition for Rehearing on the issues at the Representation hearing on the following facts:

(a) The Deutsch Company had two plants geographically separated which manufactured different products;

(b) It sold its products under separate sales departments, out of separate catalogs;

(c) Its plants were in separate cities and operated under separate autonomous plant managers, each having authority to hire and fire the employees under the respective separate plant managers, each being responsible only to the Board of Directors of the corporation;

(d) Its separate plants had different rates of pay, working conditions, and hours of work;

(e) The skill of the employees at each of the plants differed, the employees in one plant being highly skilled machinists, and the employees in the other being unskilled assemblers and packagers;

(f) The classification of the workers by sex was predominantly male in one plant, and almost entirely female at the other;

(g) The employer had no uniform personnel policy for both of its plants;

(h) There was no interchange of personnel between the plants nor any uniform seniority list between the plants;

(i) The majority of the production and maintenance employees at one plant by secret ballot election expressed their wish not to be represented by the Union while it was and is believed by both the Union and the employer that a majority of the production and maintenance employees at the other plant did desire representation by the Union.

III.

The Honorable Court of Appeals for the Ninth Circuit should decide the foregoing issues, any one of which should dispose this Honorable Court either to set aside and deny enforcement of the Orders of the National Labor Relations Board or to remand to the National Labor Relations Board for a hearing by it and a determination of the factual question posed by these issues which the National Labor Relations Board arbitrarily and in the abuse of its discretion failed and refused to consider or on which the National Labor Relations Board failed to take any evidence.

IV.

That these issues which the Honorable Court of Appeals for the Ninth Circuit did not decide should be decided as a matter of law in determining whether or not the employer has failed to bargain with the Union or has violated

Section 8(a) and subsections 1 and 5 of the National Labor Relations Act and whether or not in conducting its hearings and makings its orders the National Labor Relations Board has violated the provisions of the National Labor Relations Act and the Administrative Procedure Act and has deprived the employer and his employees of due process of law contrary to the provisions of the Fifth Amendment to the United States Constitution.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Honorable Court should grant this Petition for Rehearing upon the issues set forth herein.

Respectfully submitted,

COYLE & COOPER,
Attorneys for Petitioner Respondent,
The Deutsch Company.

LEON M. COOPER,
Of Counsel.

State of California)
) ss.
County of Los Angeles)

Leon M. Cooper, being first duly sworn, on oath, certifies and says:

That he is one of the attorneys for The Deutsch Company, Petitioner-Respondent in this cause; that he makes this certification in compliance with Rule 23 of the Rules of this Court; that in his judgment the within foregoing Petition for Rehearing is well founded and is not interposed for delay.

LEON M. COOPER.

Subscribed and sworn to before me this 5th day of May, 1959, at Los Angeles, California.

MILLICENT H. SUZUKI,
*Notary Public in and for said
County and State.*

No. 15889

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE DEUTSCH COMPANY,

Respondent.

THE DEUTSCH COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On the Petition for Rehearing to Set Aside Orders of the
National Labor Relations Board.

BRIEF OF THE DEUTSCH COMPANY.

*To the Honorable Chief Justice of the United States
Court of Appeals for the Ninth Circuit and the
Associate Justices Thereof, and to the Honorables
James A. Fee, Richard H. Chambers, Stanley N.
Barnes, Circuit Judges of the Said Court of Appeals:*

The Petitioner, The Deutsch Company, respectfully
praying that its Petition for Re-hearing on its Petition to
Modify and to Set Aside the Orders of the National
Labor Relations Board should be granted, comes now, and
in support thereof, respectfully submits:

Statement of Proceedings and Jurisdiction.

This case is before this Honorable Court upon the Petition of the National Labor Relations Board for Enforcement of its Order [Tr. pp. 105-107] and the Answer of Petitioner-Respondent, The Deutsch Company, to the said Petition for Enforcement [Tr. pp. 125-142] and upon the Petition of The Deutsch Company to Modify and Set Aside the Orders of the Nation Labor Relations Board [Tr. pp. 108-125].

On April 8, 1959, this Honorable Court made its decree enforcing the Order of the National Labor Relations Board and pursuant to its Rule 26 ordered that its Mandate be stayed for thirty days unless the Petition for Rehearing of the cause be filed meantime.

The Petition of the National Labor Relations Board was filed in the above-named Honorable Court to enforce its order that The Deutsch Company cease and desist from refusing to bargain collectively with the United Industrial Workers' Local 976, AIW-AFL-CIO and cease and desist from interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Industrial Workers Local 976, AIW-AFL-CIO or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities or other mutual aid or protection or to refrain from any activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

The Board had held a representation hearing upon which the Board issued a Decision and Direction of Elec-

tion and Certification of Representatives and Orders in Representation Case No. 21-RC-4365 [Tr. pp. 211, 342-344, 253, 352, 333, 449-451]. Thereafter, the United Industrial Workers' Local 976, filed a charge alleging that The Deutsch Company had been and was engaging in violations of Section 8(a), subsections (1) and (5) of the National Labor Relations Act. After a hearing, the Honorable Trial Examiner made his Intermediate Report and Recommended Order [Tr. pp. 29-79].

The case was transferred to the National Labor Relations Board on February 19, 1957 and on September 4, 1957 the Board made its Decision and Order, which it now seeks to enforce [Tr. pp. 80-85].

The jurisdiction of the Board arises because The Deutsch Company is engaged in interstate commerce. This Honorable Court has jurisdiction to review the said orders of the Board under and pursuant to National Labor Relations Act, Section 10, subsections (e) and (f) as amended (29 U. S. C. A., Sec. 160, subsecs. (e) and (f)).

This Honorable Court has jurisdiction to re-hear the Petition to Modify and Set Aside the Order of the National Labor Relations Board under and pursuant to its Rule 23.

Statement of Facts.

1. *The Refusal of the Board to Receive Evidence on the Employees' Sentiment as Established by the Consent Election.*

In the hearing on the charges of violations of Section 8(a), subsections (1) and (5) of the Act, The Deutsch Company offered to prove that since the time of the Representation Hearing the sentiment of the employees for

representation by the Union in one of the plants was tested by a Consent Election under an agreement entered into between the Union, all the members of the Union, and The Deutsch Company [Tr. pp. 307-320].

The Union itself had recognized the substantial differences between the Employees at The Deutsch Company's Avalon plant and those at its Regent Street plant [Tr. pp. 160-162]. The Board had also taken note of these distinctions prior to the agreement when, without any evidence or basis for evidence of the sentiment of the employees, it recognized in its Certification of Representatives that either a single-plant or a multi-plant unit would be appropriate for the purposes of collective bargaining for the Employees of The Deutsch Company [Tr. pp. 211, 338-341].

After the conclusion of the Representation Hearing the sentiment of the employees at the Avalon plant was discovered to be substantially against representation by the Union. Notwithstanding, the Union charged The Deutsch Company with unfair labor practices for refusing to bargain, although there was uncontradicted newly discovered evidence which the Board should have heard in order to ascertain whether or not its prior decision in the Representation Hearing on the appropriateness of the unit was valid. These facts in connection with other relevant facts with regard to the appropriateness of the unit for the purposes of collective bargaining were specifically rejected by the Honorable Trial Examiner, although an offer of proof was made that there was newly discovered evidence and that there was evidence of a change of circumstances with regard to the question of the appropriateness of the unit which should have been heard by the Board in order to determine whether or not there was a valid

basis for the charges of a violation of Section 8(a), subsections (1) and (5) of the Act [Tr. pp. 316-317]. This the Board refused to do. The Board in refusing to take the evidence acted arbitrarily and in the abuse of the discretion conferred upon it.

2. *The Failure and Refusal of the Board to Hear Evidence With Regard to the Elements and Factors Determining the Appropriateness of the Unit for Purposes of Collective Bargaining.*

In the Representation Hearing the greatest amount of the time was taken up with the determination of whether or not certain persons were supervisors.

The little evidence with regard to the appropriateness of the unit for the purposes of collective bargaining which was heard at the Representation Hearing included the fact that there were two separate plants for the Company in different cities having different working hours and different shifts. There was further testimony that there was no history of interchangeability of the Employees between the two plants, each of which had separate supervision.

Following the taking of the testimony at the Representation Hearing, the Union was willing to stipulate to a separate plant unit appropriate for the purposes of collective bargaining [Tr. pp. 189-195]. One of the intervening unions, however, which received no votes in any election, felt that the appropriate unit should be the entire employer unit. The Hearing Officer at the Representation Hearing believed that if the parties all should agree that there were two units the Board would accept it.

The Union's organizational procedure, as stated at the Representation Hearing, was only to apply for the Avalon

plant and treat the Regent Street plant as an entirely separate organizational problem [Tr. pp. 196-197].

In its Decision and Direction of election [Tr. pp. 338-341], the Board stated and found that the single plant unit would have been appropriate here, although it did conclude that the multi-plant unit was appropriate. However, the Decision and Direction of Election erroneously stated that the two plants were centrally administered, functionally integrated, had a uniform personnel policy and that the Employees at the two plants have similar skills. Out of these facts and others the Board concluded that a single unit at both plants would be appropriate.

If these erroneous impressions had been called to the attention of the Board, it would have satisfied the Board that the multi-plant unit was inappropriate and single-plant unit was the appropriate unit for the purposes of collective bargaining. The Deutsch Company attempted to correct these errors and to bring other relevant and material facts to the attention of the Board by a Petition for Rehearing and Reconsideration by the Board of its Decision and Direction of Election, etc. [Tr. pp. 425-446]. This Petition was denied without any hearing on the facts or arguments on the law. The Petition for Rehearing and Reconsideration had been pending, and the notice of the decision denying the Petition was not given to The Deutsch Company until after the Board had conducted its election.

It was an abuse of discretion by the Board and an arbitrary act by the Board to deny summarily the Petition for Rehearing and Reconsideration on these allegations without taking any testimony on the facts offered to the Board. It was this basic error which caused the difficulty which the Union, its members and the Employer attempted

to resolve by their own agreement for a consent election in November.

At the time of the hearing on the 8(a)(1) and 8(a)(5) charges, The Deutsch Company again offered evidence of the additional facts to correct the errors of the Representation Hearing and the newly discovered evidence with regard to the sentiment of the employees against representation by the Union at the Avalon plant. This conclusively establishes that the single-plant unit is appropriate. Again, the Trial Examiner and the Board rejected the offer of proof and made the order without hearing any of the facts or the offered testimony [Tr. pp. 307-320]. This was an arbitrary act of the Board and the abuse of its discretion, because it made its orders without giving any consideration to relevant and material facts which should have determined its action.

3. *The Refusal of the Board to Hear Any Facts Newly Discovered Involving a Change of Circumstances Because of the Schism in the Union.*

Following the hearing on the 8(a)(1) and 8(a)(5) charges the Honorable Trial Examiner made his Intermediate Report and Recommended Order. On September 4, 1957 the National Labor Relations Board issued its Decision and Order adopting the findings and conclusions and recommendations of the Trial Examiner.

On or about September 6, 1957 demands were made by one Peter Lentini as secretary of the United Industrial Workers' Local 976 AIW-AFL-CIO demanding that The Deutsch Company commence bargaining with Local 976 through him. At the same time, certain persons, including Carl W. Griepentrog, Frank Evans, and Bert Bergbackinger, claiming to be, respectively, the President, an

Executive Board Member, and a Vice-President of the International Union, Allied Industrial Workers of America, affiliated with AFL-CIO demanded that The Deutsch Company bargain with them as the agent and exclusive representative of The Deutsch Company's employees pursuant to the orders of the National Labor Relations Board. The company had been informed that the latter persons were not elected officials of Local 976, but that they had usurped the powers and functions of the officials of the Union and are acting without the authority of the Union and without complying with the constitution or by-laws of the Union. The International Union which they represent had never been certified as the exclusive representative of the employees of The Deutsch Company. The Deutsch Company was informed that the existing officers of Local 976 had abandoned and discontinued their offices and functions and that it had been dissolved and was no longer in existence by reason of the schism and certain charges and litigation pending between the Local and the International. The conflicting demands for bargaining made it impossible for The Deutsch Company to comply with any order even if the order had been a lawful one.

The Deutsch Company brought these matters to the attention of the Board by a motion for Rehearing and Reconsideration of its Decision and Order, etc. [Tr. pp. 97-101].

The Board summarily denied the Motion for Reconsideration and Rehearing based upon these newly discovered facts and change of circumstances without taking any evidence thereon [Tr. pp. 103-104]. It was an abuse of its discretion and an arbitrary act of the Board to deny this Motion without a hearing and without taking any evidence on any of the facts alleged therein.

Specification of Errors.

1. Failure to consider controlling statutes, decisions and legal principles;

2. Overlooking relevant and material facts in the record that the National Labor Relations Board failed and refused to take testimony upon relevant and material facts.

3. Overlooking the material question whether the Board acted arbitrarily in making its orders, without taking any testimony or receiving any evidence on material issues.

4. The opinion is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Plankinton Packing Company*, No. 12419, April 16, 1959, 43 L. R. R. M. 2858.

Summary of Argument.

The features of the decision and opinion of the Honorable Court upon which the foregoing grounds for this Petition are based consist of:

(1) The opinion and decision did not decide the legality of the orders of the National Labor Relations Board which carried with them an implied ruling that where the elective officers of the Union have abandoned their offices in the Union and non-elected persons of a separate Union have usurped the powers and functions of the officers and acted without having authority and without complying with the Constitution and By-Laws of the Union, and a separate Union for which they purport to act has never been certified as the exclusive bargaining agent of any of The Deutsch Company's employees, there is a schism situation whereby the Union purportedly certified to

represent the employees has no agents or officers and the Union which claims to represent the employees does not meet the description of the exclusive bargaining representative set forth in the Certification of Representations.

(2) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted contrary to the National Labor Relations Act, the Administrative Procedure Act and the Fifth Amendment to the United States Constitution in refusing to hold a hearing and take testimony on the facts involving the schism situation and involving the conflict caused by claims of two union groups to represent the employees of The Deutsch Company and by denying summarily the Motion for (1) Rehearing and Reconsideration, (2) An Order Setting Aside the Decision and Direction of Election, and (3) An Order Setting Aside Certification of Representatives.

(3) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted arbitrarily and contrary to the National Labor Relations Act, the Administrative Procedures Act and the United States Constitution in failing and refusing to consider or take evidence with regard to the desires of the employees to be represented by a Union as evidenced by the secret consent election held on the agreement of the employer, the Union, and the Union members.

(4) The decision and opinion failed to decide whether the National Labor Relations Board acted arbitrarily and in abuse of the discretion conferred upon it and contrary to the National Labor Rela-

tions Act, the Administrative Procedure Act and the United States Constitution in designating as the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act a multi-plant company unit, and in rejecting the offer of evidence at the hearing on the Complaint and refusing to take evidence upon a Petition for Rehearing on the issues at the Representation hearing on the following facts:

(a) The Deutsch Company had two plants geographically separated which manufactured different products;

(b) It sold its products under separate sales departments, out of separate catalogs;

(c) Its plants were in separate cities and operated under separate autonomous plant managers, each having authority to hire and fire the employees under the respective separate plant managers, each being responsible only to the Board of Directors of the corporation;

(d) Its separate plants had different rates of pay, working conditions, and hours of work;

(e) The skill of the employees at each of the plants differed, the employees in one plant being highly skilled machinists, and the employees in the other being unskilled assemblers and packagers;

(f) The classification of the workers by sex was predominantly male in one plant, and almost entirely female at the other;

(g) The employer had no uniform personnel policy for both of its plants;

(h) There was no interchange of personnel between the plants nor any uniform seniority list between the plants;

(i) The majority of the production and maintenance employees at one plant by secret ballot election expressed their wish not to be represented by the Union while it was and is believed by both the Union and the employer that a majority of the production and maintenance employees at the other plant did desire representation by the Union.

Introduction.

The argument made in the Brief of The Deutsch Company in support of its Petition to Modify and Set Aside the Order of the National Labor Relations Board is incorporated herein by reference. The Points and Authorities set forth therein will not be reiterated here. The arguments there made were in some respects resolved by the decision and opinion of this Honorable Court.

However, in its opinion, the Honorable Court did not consider the essential factors in this case turning on whether the National Labor Relations Board acted arbitrarily and in the abuse of its discretion in refusing to take evidence on relevant and material facts throughout its determination of the charges brought against The Deutsch Company in various hearings.

Initially, the National Labor Relations Board summarily and without taking any testimony denied The Deutsch Company's Petition for Rehearing and Reconsideration of Its Decision and Direction of Election, after the Representation Hearing. Here, additional facts could have been introduced which would have corrected erroneous findings

and reached a conclusion agreeable to both the Union and The Deutsch Company that the appropriate unit was the separate plant unit. The Board insisted on conducting an election without taking this vital evidence.

Subsequently, it was discovered that the sentiment among the employees at the Avalon plant was against representation by the Union. This, together with the other factors which pointed toward a separate plant unit as the appropriate unit, induced the Employer, the Union, and the Union Members to agree to hold a consent election to determine the sentiment of these employees for representation at Avalon. Such an election was conducted and the sentiment of the employees at the Avalon plant was conclusively established to be against representation by the Union.

Thereafter, at the time of the hearing upon the alleged charges for failure to bargain the Honorable Trial Examiner and the Board refused to take any of the evidence with regard to all of the facts with regard to the appropriateness of the unit including the sentiment of the employees to be represented by the Union. Again, it is contended that the Board acted arbitrarily and in abuse of its discretion in making its order that the Employer cease and desist from failing and refusing to bargain.

Finally, after the making of the order, new facts, newly discovered evidence and change of circumstances were brought to the attention of the Board by the Employer which was faced with a schism situation in the Union and conflicting demands for representation. Once more, the Board acting summarily and without taking any evidence denied the motion and proceeded to enforce the order. Again, the Board acted arbitrarily and in abuse of its dis-

cretion in failing to afford a fair and proper hearing to the Company.

Therefore, the Board has violated the express protection of a full and fair hearing afforded by the National Labor Relations Act and the Administrative Procedure Act, and the arbitrary rulings of the National Labor Relations Board and the abuse of the discretion conferred upon it in refusing to take evidence has resulted in denial of a fair hearing to The Deutsch Company contrary to the provisions of the Fifth Amendment of the United States Constitution.

The result has been to disenfranchise the employees of The Deutsch Company in their statutory right to choose their own bargaining representative under the provisions of the National Labor Relation Act.

For these reasons it is respectfully requested that this Petition for Rehearing should be granted by this Honorable Court.

ARGUMENT.

I.

The Honorable Court of Appeals for the Ninth Circuit Should Grant a Rehearing on the Petition of The Deutsch Company to Modify and Set Aside the Order of the National Labor Relations Board Because the Honorable Court Has Overlooked Points Made in Argument That the Board Acted Arbitrarily in Refusing to Take Evidence and Afford a Fair Hearing on Matters Relevant and Material to the Charges Made Against The Deutsch Company and Because the Decision of This Honorable Court Is in Conflict With Other Authorities, All of Which Would Bring About a Different Result.

The rules of the Court of Appeals for the Ninth Circuit afford an interested party the opportunity to petition the Honorable Court for a rehearing within thirty days after the Judgment.

Rules of the United States Court of Appeals for the Ninth Circuit, Rule 23.

The purpose of a petition for rehearing is to direct the Court's attention to some material matter of law or fact which it may have overlooked in deciding the case, and which, had it been given consideration, would probably have brought about a different result.

National Labor Relations Board v. Brown & Root,
206 F. 2d 73 (C. A. 8, 1953).

See:

Louisell and Degnan, "Rehearing in American Appellate Courts," 44 Cal. L. Rev. 627, 632-641 (1956).

The opinion of this Honorable Court gave consideration to the questions of appropriateness of the two-plant unit, the irregularities of the Board-conducted election, the lack of the majority of the employees voting thereat, the validity of the consent election, the waiver by the union of its rights and the Company's good faith in bargaining. It is respectfully submitted that the Honorable Court did not consider the arbitrary manner in which the Board abused the discretion conferred upon it in refusing to take relevant and material testimony in making its decision. Although the Court did consider the Board's decision as to the appropriateness of the single plant unit and even noted that the Board could have found either way, this Honorable Court did not in its opinion touch upon the question whether or not the Board's determination was made in light of all of the evidence which was offered to it and which it rejected at the time of the representation hearing, prior to the Board-conducted election, at the time of the Board hearing, and subsequent thereto.

This Honorable Court in its opinion did not consider whether the newly discovered evidence and change of circumstances as shown by the private consent election were arbitrarily excluded from the Board's consideration in making its determination of the appropriate unit for collective bargaining and in deciding whether or not The Deutsch Company had violated sections 8(a)1 and 8(a)5 of the Act. Because no evidence was taken upon these matters which were relevant and material both on the representation question and on the unfair bargaining question, the Board's arbitrariness and abuse of discretion are established.

Finally, when newly discovered evidence and a change of circumstances involving a schism situation were brought

to the attention of the Board by a Motion for Rehearing and Reconsideration, and the Board summarily rejected the Motion without taking any evidence thereon, it is respectfully suggested that this Court should have given consideration in its opinion to the fact that the Board acted arbitrarily and in abuse of its discretion in failing to take evidence upon this matter vitally connected with its cease and desist order.

The National Labor Relations Act requires the employer to bargain with the representative of its employees subject to provisions of Section 9(a).

National Labor Relations Act, Sec. 8(a)5; 29 U. S. C. A., Sec. 158(a)(5).

Section 9(a) defines the exclusive representative of the employees for purposes of collective bargaining as the representative in a unit appropriate for purposes of collective bargaining. In making the determination the Board shall consider whether or not unit appropriate for the purpose of collective bargaining assures to the employees the fullest freedom in exercising the right guaranteed under the National Labor Relations Act.

National Labor Relations Act, Sec. 9(b); 29 U. S. C. A. Sec. 159(1).

These are the questions which underly whether or not a fair hearing was afforded to The Deutsch Company and its employees by the National Labor Relations Board. If they were not, the resultant administrative errors which caused the confusion recognized by both the Union and The Deutsch Company do explain the bargaining problems confronting The Deutsch Company. It is respectfully suggested that a rehearing by this Honorable Court will convince the Honorable Court of the fact that the Board

acted arbitrarily and in the abuse of the discretion conferred upon it, and contrary to the provisions of the National Labor Relation Act, the Administrative Procedure Act and in violation of the rights of The Deutsch Company and its employees under the Fifth Amendment to the United States Constitution.

II.

Before the Board Can Validly Order an Employer to Bargain With the Union or Charge the Employer for Refusal to Bargain in Violation of Sections 8(a)(1) and 8(a)5 of the Act, the Board Must Establish That the Employer Has Refused to Bargain With the Union on the Basis of the Unit Appropriate for Collective Bargaining Purposes.

If the unit is in fact inappropriate, the employer would violate the rights of his employees and the provisions of the National Labor Relations Act in bargaining with a purported representative in an inappropriate unit.

Endicott-Johnson Corp., 108 N. L. R. B. 88 (1954);

Goddard & Co., Inc., 105 N. L. R. B. 849 (1953).

Therefore, when the employer refuses to bargain even with the certified union which is not the representative of the employees in an appropriate unit, it is not a violation of Section 8(a)(5) of the Act.

Carson Pirre Scott & Co., 75 N. L. R. B. 1244 (1948).

It is not the intention of the Petitioner to reiterate the argument and the authorities establishing that a single-plant unit is the only appropriate unit for the purposes of collective bargaining for The Deutsch Company. These

matters were covered in detail on pages 38-45 of The Deutsch Company's Brief on the Petition to Modify and Set Aside the Order of the National Labor Relations Board filed in this Honorable Court.

However, recent decisions by the National Labor Relations Board are at a variance with its determination of the appropriateness of the unit in this case. It is respectfully requested, therefore, that this Honorable Court consider, in passing, these decisions; for, if the Board, in attempting to establish some sort of a standard, arbitrarily varies it, the Courts are inclined to consider the Board's action arbitrary. Some consideration to standards established by the Board must be given by the Board in its subsequent decision. Even though the customary practices of the Board may be left to a case-by-case application, an inherent inconsistency in the Board's decision proves arbitrariness.

National Labor Relations Board v. Plankinton Packing Co., 43 L. R. R. M. 2858 (C. A. 7, April 16, 1959).

In the recent decision of *In re Tele-computing Corp.*, 122 N. L. R. B. No. 81, 43 L. R. R. M. 1167 (Dec. 19, 1958), the Board held that a single-plant unit of an aircraft valve manufacturing company's production and maintenance employees is appropriate, notwithstanding a considerable degree of integration among the employees of various plants in the Los Angeles area. The employer had plants in Lynwood, Hollywood, Van Nuys, North Hollywood and Culver City, California. The Board had found that the unit appropriate was the single-plant unit, even though there was a considerable degree of functional and administrative integration between the various plants involved. On the other hand, the Board also noted the

geographical separation of the plants, the absence of employee interchange, the degree of local plant autonomy, the absence of a bargaining history, the fact that no labor organization sought a broader unit, and with respect to the Van Nuys plant, a difference in products manufactured.

The similarity between the *Tele-Computing Corp.* decision and The Deutsch Company facts is striking. All of the elements in that decision exist here. The Board, therefore, in the same locality and the same industry has shown patent inconsistency in its rulings on the appropriateness of the unit. It is the inconsistency between the positions taken by the Board in the present case and in the *Tele-Computing* case, which is respectfully called to the attention of this Honorable Court. This inconsistency proves the Board's arbitrariness here.

As a rule, this Honorable Court should accept the unit determination of the National Labor Relations Board, unless a review of the entire record shows that the Board has acted arbitrarily or without rational cause.

N. L. R. B. v. Plankinton Packing Co., supra;

N. L. R. B. v. Glen Raven Knitting Mills, 235 F. 2d 413 (C. A. 4, 1956).

Thus, this Honorable Court should not only consider, as it did, the inconsistency of the Board's decisions on the appropriateness of the unit in similar cases, but whether or not the Board afforded a full and fair hearing to all of the parties concerned by taking all of the relevant and material evidence offered in connection with its decision. If it did not do so, then clearly the Board acted arbitrarily, and this Honorable Court should afford a rehearing on the matter before it to consider this issue.

III.

The National Labor Relations Board Acted Arbitrarily, and in Abuse of the Discretion Conferred Upon It, Contrary to the Provisions to the National Labor Relations Act, the Administrative Procedure Act, and the Fifth Amendment to the United States Constitution in Failing and Refusing to Receive Evidence With Regard to Relevant and Material Facts on the Appropriateness of the Unit for Purposes of Collective Bargaining, During, and After, the Representation Hearing, and Hearings on the Unfair Labor Charges, and This Honorable Court, Therefore, Should Remand the Matter to the Board to Take This Evidence.

The National Labor Relations Board first refused to hear the significant and relevant evidence as to factors determining the appropriateness of the unit immediately following its Decision and Direction of Election. It indicated in its Decision and Direction of Election that either the single-plant or multi-plant unit might be appropriate for the purposes of collective bargaining.

When the Board was thereafter confronted with a Petition for Reconsideration and Rehearing which offered additional evidence, not theretofore adduced, on the question of appropriateness of the unit, the Board summarily denied the petition and refused to consider the additional evidence. That began the confusion which resulted in the Union, its members and the Employer making an agreement for a consent election to determine the sentiment of the employees since it was felt that the Board-conducted election has been totally inadequate even though it may have complied with certain legal formalities.

Subsequently, upon the hearing of the 8(a)(1) and 8(a)(5) charges, evidence as to the proper and appropriate unit for the purposes of collective bargaining was

again offered together with newly discovered evidence in regard to the sentiment of the employees at the Avalon plant. This testimony was again rejected by the Board, and, therefore, did not play a part in the decision of the Honorable Trial Examiner or the Board.

The Court of Appeals for the Second Circuit found that it was reversible error for a trial examiner to refuse to require a union witness to answer certain questions on cross-examination even though the Board contended that the Company was not harmed because the examiner and the Board accepted the testimony of the Company witnesses about the subject involved. However, the Board of Appeals, Judge Frank writing the opinion, indicated that it was reversible error for this testimony to be excluded since the Court could not determine what the testimony might have disclosed on the relevant issues involved. Thus, the case was remanded to the Board with directions to reopen the hearing to permit the examination of the witness. The Board would then reconsider the findings in light of this testimony.

Daily Review Corp. v. N. L. R. B., 192 F. 2d 269
(C. A. 2, 1951).

The Board has contended that even if this evidence is admitted it would make no difference because the order of the Board would be the same. However, the Courts of Appeal in reviewing the decisions of the National Labor Relations Board have consistently rejected this argument. They have found the rejection of relevant and material evidence to be a denial of due process contrary to the provisions of the Fifth Amendment to the United States Constitution.

In *Donnelly Garment Co. v. N. L. R. B.*, 123 F. 2d 215 (C. C. A. 8, 1941), Judge Sanborn, writing the opinion, stated at page 224:

“That a refusal by an administrative agency such as the National Labor Relations Board, to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a Court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir., 97 F. 2d 13, 15; *Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board*, 7 Cir., 114 F. 2d 611, 621.”

This well-established rule has been consistently followed. In *National Labor Relations Board v. Burns & Gillespie*, 207 F. 2d 434 (C. A. 8, 1953), the Court approved the *Donnelly Garment Co.* opinion and again found a deprivation of due process in the proceedings before the Board since the proffered evidence was competent and material and should have been received and considered. The fact that the Board contended that, even though the exclusion was erroneous, it was harmless and should be ignored since it would not change the result, did not derogate from the deprivation of due process.

The National Labor Relations Board is not permitted either by the National Labor Relations Act, or the Admin-

istrative Procedure Act to ignore material, uncontradicted facts.

National Labor Relations Board v. Cleveland Trust Co., 214 F. 2d 95 (C. A. 6, 1954).

The Administrative Procedure Act provides that . . .

“No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and is supported by and is in accordance with the reliable, probative and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

Administrative Procedure Act, Sec. 7(c), 5 U. S. C. A. 1006(c).

The Labor Management Relations Act requires the Board to make its decision upon the preponderance of the testimony taken.

Labor Management Relations Act, Sec. 10(c), 29 U. S. C. A. 160(c).

When these matters are reviewed, the findings of the Board with respect to questions of fact must be supported by substantial evidence on the record considered as a whole; and the Court may order the taking of additional evidence if it is satisfied that it is material and that there are reasonable grounds for the failure to adduce such evidence in the hearings of the Board or the trial examiner.

Labor Management Relations Act, Sec. 10(e), 29 U. S. C. A. 160(e).

The provisions of the Administrative Procedure Act provide that the reviewing court in deciding relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of any agency action should hold unlawful and set aside agency actions, findings and conclusions found to be:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(2) Contrary to constitutional right, power, privilege or immunity;

(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory rights;

(4) Without observance of procedure required by law;

(5) Unsupported by substantial evidence. . . . Administrative Procedure Act, Section 10(e), 5 U. S. C. A. Sec. 1009(e).

The United States Supreme Court has been scrupulous in protecting against the deprivation of due process in violation of loose administrative procedure which has resulted in orders and decisions upon less than a complete record of material facts.

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951).

This Honorable Court itself has remanded to the National Labor Relations Board cases with directions to consider the matters on the merits where a full consideration on the merit was not afforded by the Board.

National Labor Relations Board v. Olaa Sugar Company, 242 F. 2d 714 (C. A. 9, 1957);

National Labor Relations Board v. International Woodworkers of America, 238 F. 2d 378 (C. A. 9, 1956).

The Petition for Enforcement here is based upon alleged violations of Sections 8(a)(1) and 8(a)(5) of the Act, but a determination of this question involves, preliminary, the decision as to what is the appropriate unit for the purposes of collective bargaining, designated or selected by the majority of the employees. This decision is usually made after a representation hearing and the decision and direction of election following thereon. Here, all of the relevant evidence was not adduced at that hearing. The Petition for Rehearing and Reconsideration to adduce additional relevant and material evidence was summarily denied. The Union, its members and the Employer then attempted to resolve the confusion generated by the administrative, statutory and constitutional error of the Board. When, thereafter, a hearing on unfair labor charges was had, the evidence was again summarily denied and the evidence of the sentiment of the employees, newly discovered, which was also relevant and material, was rejected. The order of the Board, therefore, was not made upon a full hearing of the relevant and material evidence. The provisions of the Administrative Procedure Act and the National Labor Relations Act were flagrantly violated. The Board made its decisions arbitrarily and in abuse of the discretion conferred upon it. Since a fair hearing was denied to The Deutsch Company and its employees, due process of law guaranteed by the Fifth Amendment of the Constitution of the United States was denied them. The remedy available to them pursuant to the Act is for this Honorable Court to remand the case to the Board for the taking of such additional evidence as may be necessary and the modifying of the findings by reason of the evidence so taken and filed and thereafter filing its recommendations for the modification or setting aside of the Board's original order.

IV.

The National Labor Relations Board Acted Arbitrarily and in the Abuse of the Discretion Conferred Upon It Contrary to the Provisions of the National Labor Relations Act and the Administrative Procedure Act and in Violation of the Rights of The Deutsch Company and Its Employees Under the Fifth Amendment to the United States Constitution in Refusing to Take Evidence on the Schism Situation in the Union Which Occurred After the Conclusion of the Hearing by the Board.

After the National Labor Relations Board made its decision and issued its cease and desist order, a schism occurred in the Union. The officers of the Union were ousted, and their activities were seriously called into question. Litigation was commenced against some of them. However, both those officers and other individuals who were not officers or delegated agents of the Union demanded that The Deutsch Company bargain with them as the representative of The Deutsch Company employees. These other persons were officers of the Allied Industrial Workers Union of America, AFL-CIO. It appeared from the facts that these other persons had usurped the functions of Local 976 which had been abandoned and dissolved. The Board has denied there was such dissolution or schism. It has not, however, taken any evidence on the issue and has only made a summary denial of the motion of The Deutsch Company for a rehearing and reconsideration on those facts.

It is clear that the employees of The Deutsch Company never voted for the Allied Industrial Workers Union of America, AFL-CIO, as their representative. On the other hand, Local 976 which was certified has apparently been dissolved. Thus, when there is an attempt to charge The

Deutsch Company with a violation of the National Labor Relations Act in refusing to bargain collectively with the representatives of its employees, it is necessary to consider, initially, who those representatives are. Under Section 9(a) of the Labor Management Relations Act they are the representatives designated or selected for the purposes of collective bargaining by the majority of the employees. Section 7 of the Act gives the employees the right to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing. Thus, it is relevant and material that the representative be a representative within the meaning of the Act. It is clearly not the case here.

At any rate, the facts with regard to whether or not there is a schism situation have never been fully examined. They must be examined by the Board and the Board must determine the substance of the situation in order to ascertain whether or not the schism in the Union has removed from the employees their basic statutory right to express their choice.

Dickey v. N. L. R. B., 217 F. 2d 652 (C. A. 6, 1954).

The essence, therefore, of the Board's arbitrary act is that it has failed and refused to receive evidence on the situation and to examine the facts and to determine the substance of the situation.

We will not cite here the arguments and authorities made with regard to the deprivation of due process, arbitrariness, abuse of discretion and violation of the law and the Constitution which we have heretofore made in this brief. Suffice it to say, that the same authority is applicable in connection with the failure to take evidence on the

schism situation as with the failure to take evidence regarding the appropriateness of the unit for purposes of collective bargaining.

It is significant to note that where circumstances have occurred after the Board's order has been issued which may affect the propriety of the enforcement of the order, the reviewing Court has discretion to decide the matter or to remand the matter to the Board for further consideration.

National Labor Relations Board v. Jones & Laughlin, 331 U. S. 416, 427 (1947).

National Labor Relations Act, Sec. 10(e), 29 U. S. C. A. 160(e).

Thus, where the record fails to show a determination of material factors in determining a vital issue on a petition for enforcement, the Court of Appeal may remand the case to the Board in order to have answers to questions which may have a material bearing upon the proper determination of the issues presented.

National Labor Relations Board v. Mid-Co Gasoline Co., 172 F. 2d 874 (C. A. 5, 1949);

National Labor Relations Board v. Cambria Clay Products Co., 215 F. 2d 48 (C. A. 6, 1954).

It is significant to note that even the National Labor Relations Board in its own procedure does not hesitate to reopen a matter for the taking of additional testimony when the question of the affiliation of the members of the representative union is involved. This is particularly true where there is a highly skilled unit such as machinists seeking separate representation.

In re Standard Forgings Corp., 29 N. L. R. B. 290 (1941).

In any event, because these relevant facts occurred subsequent to the Board's decision and testimony thereon was summarily rejected by the Board and because in any event a fair hearing requires the taking of testimony in regard to these facts, it is respectfully submitted that the Board has abused its discretion and acted arbitrarily in violation of both the statutory protections and the Constitutional rights afforded The Deutsch Company and its employees.

Conclusion.

It is respectfully suggested that the opinion of this Honorable Court did not give consideration to the arbitrary acts and the decisions and rulings of the Board in abusing the discretion conferred upon it, contrary to the provisions of the Administrative Procedure Act, the National Labor Relations Act and the Constitution of the United States.

It is for this reason that the significant elements of the charges have not fully been heard by the Board in making its order. This Honorable Court should, therefore, grant a rehearing upon this matter in order to hear and determine these issues and remand the case for the taking of additional evidence.

Respectfully submitted,

COYLE & COOPER,

By LEON M. COOPER,

Attorneys for Petitioner.

No. 15,905 ✓

See also
Vol. 3084

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIAM DORN, JR.,

Appellant,

VS.

BALFOUR, GUTHRIE & CO., LIMITED, a
corporation,

Appellee.

**MOTION TO RECALL MANDATE, AND PETITION FOR LEAVE
TO FILE SECOND PETITION FOR REHEARING, AND
SECOND PETITION FOR REHEARING.**

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FILED

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No. 15,905

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM DORN, JR.,

Appellant,

VS.

BALFOUR, GUTHRIE & Co., LIMITED, a
corporation,

Appellee.

**MOTION TO RECALL MANDATE, AND PETITION FOR LEAVE
TO FILE SECOND PETITION FOR REHEARING, AND
SECOND PETITION FOR REHEARING.**

*To the Honorable Walter L. Pope, Frederick G. Ham-
ley and Gilbert H. Jertberg, Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant in the above entitled case hereby moves the court to recall the mandate heretofore issued and petitions the court for leave to file a second petition for rehearing, which is hereby presented.

Leave is asked because of new law since the denial of the original petition for rehearing.

Action is by appellant, a longshoreman, against respondent as ship's husband of the SS RIMAC. The court held that the record showed no evidence of control of the ship by appellee and further that appellee owed no duty to the appellant. In the briefs before

this court, appellee had cited *Romero v. International Terminal Operating Co.*, 142 F.S. 570. Appellant's petition for rehearing was denied on February 3, 1959, and the mandate issued to the District Court on February 10, 1959. On February 24, 1959, the Supreme Court vacated the part of the decision in the *Romero* case dealing with the ship's husband. (*Romero v. International Terminal Operating Co.*, 27 L. W. 4161, 4170, 79 Sup. Ct. Rep. 468, 487.) It returned the case to the District Court to consider the question of negligence, independently of employment, operation or control.

Possible negligence on the part of the ship's husband subsumes a duty to the plaintiff. Cf. *C. & O. R. Co. v. Mihas*, 280 U.S. 102, 106. Such negligence may rest upon evidence other than evidence of operation or control of the ship. (*Romero v. I. T. O. Co.*, 79 Sup. Ct. Rep. 468, 487.)

It is submitted that the holding of the Supreme Court in the *Romero* case is contrary to the holding of this court in the present case.

A rehearing should be granted to consider the effect of the Supreme Court's decision.

Dated, San Francisco, California,
March 16, 1959.

Respectfully submitted,
GARRY, DREYFUS, McTERNAN & KELLER,
GEORGE OLSHAUSEN,
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and Petitioner.*

*See also
Vol. 3066*

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CONTINENTAL TRADING, INC.,
Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15912

CONTINENTAL TRADING, INC.,
Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

*To The Honorable Pope, Denman and Orr, Circuit Judges
of the United States Court of Appeals for the Ninth
Circuit:*

Under Rule 23, Continental Trading, Inc. respectfully petitions for a rehearing in connection with the Opinion filed by this court on March 10, 1959 affirming the decision of the Tax Court of the United States. Should this Court grant a rehearing it is suggested that the case be reheard *en banc* because of its importance.

Question Presented

Whether this Court should reconsider its Opinion and grant a Petition for Rehearing because of its failure to recognize the applicability of the Supreme Court's rule of "integration" of corporate activities as the proper test to be applied under Section 231(b) in determining whether a corporation is engaged in trade or business within the United States.

Statute Involved

Sec. 231. TAX ON FOREIGN CORPORATIONS

(b) RESIDENT CORPORATIONS.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14(c)(1) and Section 15.

Statement

The statement of facts appearing in this Court's opinion is adopted *pro tanto* for the purpose of this Petition. It must be added, however, that there are two other categories of facts (in addition to those specifically found by the Tax Court and adopted by this Court) which could become relevant.

The first category mainly involves facts which were not expressly found by the Tax Court but which were stipulated by the parties. The facts, as stipulated, were found by the Tax Court but were not published by it *in extenso*. This category also includes a few facts taken from uncontroverted testimony appearing in the Transcript. All of these facts in the first category are referred to specifically in footnotes "n" and "o" in Brief for the Petitioner on pp. 11-12, thereof. They concern the many and varied activities of the petitioner in the United States during the years in issue including: the continued presence of some

of its officers on American soil, frequent negotiations in this country by petitioner's president in an effort to establish recombined milk plants abroad, the constant drawing of checks in this country, the incurring of many office expenses, the collection of dividends, the sale of stock and the borrowing of money. This category is referred to only briefly herein.

The second category of facts relative to the present question consists of those which were not presented to the Tax Court, but which were referred to in an offer of proof made before the Tax Court in an oral argument relating to petitioner's Motion for Leave to File Motion to Vacate Decision, to Reopen the Proceedings and to Take Further Testimony. See R. 271-279. These facts include, *inter alia*, extensive negotiations in 1949 conducted by petitioner's officers in the United States to sell a Mexican race track and to sell two subsidiary corporations of petitioner, Bank Continental and Pan American Trust Company as well as negotiations in the United States culminating in the merger of the two telephone systems in Mexico City. These facts are not discussed further in connection with this Petition.

ARGUMENT

The Legal Test for Determining Whether a Foreign Corporation Is Engaged in a Trade or Business Within the United States Requires that Its Activities and Situation Be Judged as a Whole. Because the Opinion in this Case Has Failed to Apply this Test, Petition for Rehearing Should Be Allowed.

The petitioner respectfully represents that the opinion promulgated by this Court on March 10, 1959 fails to apply the proper legal test in resolving the issue of whether or not petitioner was a resident corporation in the United States, that is, whether it was engaged in trade or business

within the United States. Failure to enunciate and apply the proper legal test—consideration of the taxpayer's situation and activities in their entirety, as enunciated by the Supreme Court of the United States in *Edwards v. Chile Copper Co.* (1926) 270 U. S. 452,—is the defect complained of. It is submitted that if this test is applied to the uncontroverted facts, the conclusion inevitably would be reached that the petitioner was engaged in a trade or business within the United States during the taxable years. This legal test is, therefore, of controlling significance in this case. The application of the test by this Court under the rule of *stare decisis* should have required this Court to reverse the Tax Court below, not to affirm it.

Section 231(b) of the Internal Revenue Code of 1939 provides in effect that a foreign corporation "engaged in trade or business within the United States" shall be taxed as if it were a domestic corporation, although Section 231(c) limits its gross income, for purposes of the tax, to income from sources within the United States.

So far as petitioner can ascertain, none of the Circuit Courts of Appeal have previously construed this statute. Consequently, this seems to be a case of first impression at the appellate level, and for this reason the case has a significance beyond its own limits, in view of the large number of foreign corporations which have activities in the United States.

In its brief, counsel for petitioner showed that the Supreme Court of the United States had long ago enunciated the "rule of integration" in *Edwards v. Chile Copper Co.*, *supra*, in a case involving the question of whether a domestic corporation was "carrying on or doing business" under a Federal tax law. There it was held that the activities of a corporation (meaning within the United States) must be *integrated*, i.e., considered as a whole, in determin-

ing whether it was doing business, which is synonymous¹ with engaging in trade or business, in this country. Speaking through Mr. Justice Holmes, the Court said:

“* * * we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole.”

This Court did not even refer to the *Chile Copper* case in its opinion² and it would seem that no attention was paid to it. The varied activities of petitioner are described on pages 23 and 24 of the Brief and show, within the language of the *Chile Copper* case, that petitioner in the United States “was doing what it was organized to do in order to realize profit.” The fact that petitioner’s negotiations for the erection of milk plants abroad produced no income is of no consequence so long as the negotiations took place. The petitioner completely satisfied the rule of the Court of Appeals for the Second Circuit announced in *Union In-*

¹ See *Lewellyn v. Pittsburgh, B. & L. E. R. Co.* (CCA-3, 1915) 222 F. 177; G. C. M. 17014, XV-2 C. B. 317.

² The only cases cited by this Court in its opinion are: (1) *Higgins v. Com.*, 312 U. S. 212; (2) *Com. v. Smith* (CCA-2) 203 F. (2d) 310, and (3) *Linen Thread Co. v. Com.* (CCA-2) 128 F. (2d) 166. The first of these cases involved mere investment activities by an American citizen generated by him off American soil as a resident of Paris, France; the present case involves various kinds of activity generated by a corporation on American soil. The second case also is limited to individual investment activity. The third case was decided under an old statute and regulation which have been changed. Congress, in 1942, abolished the alternative test of “office or place of business” and retained the single test of “engaged in trade or business” for qualification as a resident foreign corporation. In any event, petitioner in the present case has shown a complex of varied activities going beyond the scope of mere “casual or incidental” transactions, although these latter, if any activities of petitioner can be properly characterized as such, must be considered as a stick among numerous sticks making up the fagot if the Supreme Court’s rule is to be applied.

ternationale de Placements v. Hoey (CCA-2, 1938) 96 F. (2d) 591:

“This appellant could come into the jurisdiction and be present here only by sending in to the jurisdiction or maintaining here its officers or other agents * * *.”

The foregoing is precisely what the petitioner did.

This Court has cited the *Chile Copper* case with approval in a number of instances. In *Section Seven Corporation v. Anglim* (CCA-9, 1943) 136 F. (2d) 155, this Court, citing *Chile Copper*, observed:

“No special volume of business is necessary to bring it [the corporation] within the taxing act—a very slight activity may be deemed sufficient to constitute ‘doing business’ ”.

In *U. S. v. Western Shore Lumber Co.* (CCA-9, 1943) 136 F. (2d) 628, this Court cited *Chile Copper* for the statement:

“The situation and activities must be considered in their entirety.”

Again this Court cited the *Chile Copper* case in *Barker Bros. Corp. v. Rogan* (CCA-9, 1942) 126 F. (2d) 917. In that case this Court stated:

“Hence borrowing from one of the subsidiaries is no different from borrowing from a bank and the aid in securing for the subsidiary company a lease of a store for its furniture business is nonetheless a business transaction, whether in so doing appellant be regarded as principal or agent. The fact that there was a single objective to be attained by these transactions carried on by the appellant and its two subordinate corporations would make it nonetheless an enterprise engaged in by each of the three.”

In *U. S. v. Hercules Mining Co.* (CCA-9, 1941) 119 F. (2d) 288, this Court again cited the *Chile Copper Co.* case in the following context:

“We do not rest our decision upon any particular activity of the corporation. *Perhaps each might be examined separately and separately discarded as not of a character so substantial as to be called business. But taxpayer’s situation and activities must be judged in their entirety.*” (Emphasis supplied)

Significant for the purposes of the present discussion is the presence in the *Hercules Mining Co.* case of “other transactions or activities of a non-continuous nature.” These do not appear to be conceptually different from the so-called “casual or incidental” transactions in the present case and yet they were included in the view this Court took of the “entirety.”

This Court’s opinion in the present case does not cite any of its own opinions just mentioned nor, as stated, does it cite the Supreme Court’s opinion in *Edwards v. Chile Copper Co.*, *supra*. Indeed, this Court has followed the fragmentation rather than the integration approach.

It first considers what it describes as the taxpayer’s “investment” activities alone. It cites *Higgins v. Commissioner* (1941) 312 U. S. 212 for the proposition that mere management of investments and the collection of dividends is insufficient to constitute the carrying on of a trade or business. The activities of the present petitioner go far beyond mere investment activities, but under the rule of integration of the *Chile Copper* case, the investment activities must be considered along with all the other activities³ in applying the required test of integration.

³ See *Comm. v. Nubar* (CCA-4, 1950) 185 F. (2d) 854, and *Adda v. Comm.* (CCA-4, 1948) 171 F. (2d) 457.

Next, this Court's opinion gives consideration to "some other activities of the petitioner." Following the pattern of the Tax Court below, these activities are described as "isolated and non-continuous" or "casual or incidental" transactions, although they were in reality very great in number and should hardly have been called "isolated and non-continuous." These activities, too, are considered separately, and standing alone they are held by this Court to be "not sufficient to show the corporation to be 'engaged in trade or business'".

It is respectfully urged, therefore, that this Court's opinion in this case has *not* regarded petitioner's activities as an integrated whole in reaching its conclusion. It has examined the various activities of the corporation separately and has separately discarded them, to paraphrase this Court's own language in *U. S. v. Hercules Mining Co.*, *supra*. This procedure specifically was disapproved in *Edwards v. Chile Copper Co.*, *supra*, where the Supreme Court decried the destruction of the fagot by separately breaking each stick.

It is submitted that this Court should have concluded that the *combination* of petitioner's other activities with its investment activities constituted a sufficient *quantum* and *quality* of activity to require the conclusion of law that petitioner was engaged in a trade or business in the United States, under the rule and rationale of *Edwards v. Chile Copper Co.* and the related cases in this Circuit.

As a concomitant of its fragmentation approach, this Court's opinion holds that whether the "other activities of petitioner" should properly be regarded as "casual or incidental transactions" is a question of fact within the competence of the Tax Court. The opinion likewise holds that the problem of "whether as such, those transactions served

to change an otherwise 'non-trade or business' corporation into one within 231(b) is also a question of fact."

Petitioner has already shown why the first of these holdings does not conform to the rule of the *Chile Copper* case. Petitioner submits that the second of these holdings is in reality a question of law under the same decision to be applied to a totality of facts.

The mere recitation of the *entire list* of petitioner's activities during the taxable years would seem to require the conclusion that the fagot was sufficient to qualify the petitioner. Having in mind the factual patterns in the previously mentioned cases decided by this Court involving corporate business activity, both the *quantum*, and more important, the *quality* of petitioner's activities during the taxable years were significantly greater.

Petitioner here:

(a) Negotiated seven bank loans aggregating over \$6,800,000

(b) repaid a considerable portion of these loans together with interest

(c) drew 199 checks on two bank accounts, which items aggregated in excess of \$4,000,000.00

(d) purchased equipment in the United States as an accommodation for a foreign corporation

(e) purchased and resold a freight carload of fat

(f) purchased and resold 91 freight carloads of tin cans, three of which were sold to unrelated purchasers

(g) negotiated in the United States and abroad with respect to the petitioner's program for erecting recombined milk plants

(h) collected over \$1,800,000.00 in dividends

(i) sold 55,000 shares of Servel stock

(j) borrowed sizable sums from its president and repaid them

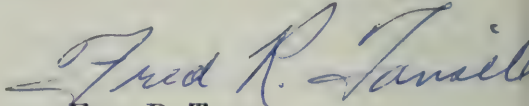
- (k) maintained a *de facto* office in Oakland, California
- (l) maintained two of its officers in California who were active in the United States.

That all of these activities consumed the time, attention and interest of its officers is evidenced by the fact that a variety of significant office expenses were incurred including postage, insurance, telephone, telegraph, legal, printing, photostating and travel. Most important, the great bulk of all these activities described are taken from the agreed stipulation of facts in the Tax Court while the remaining few are taken from uncontroverted testimony in the record. While many of these facts were not even adverted to by the Tax Court, it is earnestly submitted that under the proper legal test petitioner's activities as a whole should have been considered, and that such consideration fairly requires the conclusion that petitioner was engaged in business in the United States.

Conclusion

This Court should grant this Petition for Rehearing and, in its discretion if it does so, order a rehearing *en banc*.

Respectfully submitted,


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Certificate of Counsel

Fred R. Tansill, counsel for the petitioner in this Petition for Rehearing, hereby certifies that in his judgment the filing of this Petition for Rehearing is well founded and, further, certifies that this Petition is not interposed for delay.



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April, 1959.

See also: Vol. 3067

No. 15,929 ✓

**United States Court of Appeals
For the Ninth Circuit**

JAMES HENRY AUDETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
District of Idaho, Central Division.**

APPELLANT'S PETITION FOR A REHEARING.

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FILED

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PAUL P. O'BRIEN, CLERK

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**United States Court of Appeals
For the Ninth Circuit**

JAMES HENRY AUDETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
District of Idaho, Central Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

STATEMENT.

Appellant was charged by two counts of an indictment with the violation of two subsections of 18 U.S.C. Section 2113. Count I charged a violation of subsection (a), entry of a bank with intent to commit larceny. Count II charged a violation of subsection (b), grand larceny. He was convicted on both counts and sentenced on Count I to 20 years imprisonment and on Count II to 10 years. This Honorable Court, assiduous in its pursuit of justice, discovered and held as error the imposition of two sentences for one offense. This Court further determined that the sentence on Count II became merged in the sentence on

Count I and modified the judgment by striking therefrom the sentence imposed on Count II.

Appellant respectfully urges that justice would be accorded him on this point, if this Court would hold that:

1. The sentence on Count I was merged in Count II; and
2. The cause is reversed and remanded to the District Court for redetermination of appellant's sentence.

SUMMARY OF ARGUMENT.

Appellant contends that a rehearing should be granted because:

1. The sentence on Count I was merged in the sentence on Count II.
2. The cause should be reversed and remanded to the District Court for redetermination of appellant's sentence.

ARGUMENT.

I.

THE SENTENCE ON COUNT I WAS MERGED IN THE SENTENCE ON COUNT II.

- A. The sentence on Count I should be merged in the sentence on Count II because Count II charges the more aggravated offense.

Count II charges the actual commission of a larceny and therefore defines an offense more serious than

Count I which charges an entry with intent to commit a larceny.

Many Courts have held that where a defendant has committed but one offense and has been sentenced erroneously under more than one subsection of Section 2113, that he may be sentenced only for the more aggravated crime.

In *Wilson v. United States* (Ninth Circuit), 145 Fed. 2d 734, the defendant had been convicted on Count I of a violation of subsection (a) of Section 588 (the predecessor to present Section 2113) and on Count II of subsection (b) of Section 588. The Court held that the two counts charged a single offense and further held as follows:

“Since Count 2 charged aggravating circumstances and Count 1 did not, appellant should have been sentenced on Count 2 and should not have been sentenced on Count 1.”

In *Wells v. Swope*, 121 Fed. Supp. 718, the defendant had been sentenced under Count 1 for 20 years for entering the bank with intention to commit a felony and on Count 2 to 25 years for armed robbery, the sentences to run consecutively. The Court held that the first charge merged into the second charge and that the sentence on Count 1 was void. This case was subsequently reversed by *Madigan v. Wells*, 224 Fed. 2d 577 on the ground that the lower Court had no jurisdiction to issue the writ of habeas corpus.

See also:

United States v. Harris, 97 Fed. Supp. 154;

United States v. Tarricone, 242 Fed. 2d 555;

United States v. Nirenberg, 242 Fed. 2d 632;
United States v. DiCanio, 245 Fed. 2d 713.

Prince v. United States, 352 U.S. 322, 328, held that Congress intended in Section 2113 as follows:

“ . . . that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, that is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. . . .”

- B. Congress must have intended that the maximum sentence imposable for entering a bank with intent to commit larceny should be no greater than the maximum sentence imposable for the actual commission of the crime of larceny.**

Subsection (a) of Section 2113 includes both the crime of entry of a bank with intent to commit larceny and entry of a bank with the intent to commit robbery. The maximum sentence for violation of subsection (a) (20 years) is the same maximum sentence for the actual commission of the crime of robbery. The maximum sentence for the actual commission of the crime of larceny is 10 years. Clearly, the crime of robbery carries a heavier penalty than larceny because it is a more serious crime. Even though the robbery is not consummated, Congress intended the penalty to be the same as if it had been consummated. *Prince v. United States*, 352 U.S. 322. Congress

could not have intended the incongruous result that a larceny not consummated carries a penalty *double* the penalty incurred where a larceny is consummated.

II.

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO REDETERMINE THE SENTENCE WITHIN THE MAXIMUM ALLOWED PERIOD.

Where the District Court has improperly sentenced a defendant under two subsections of Section 2113, the cause should be remanded to the trial Court to redetermine the sentence.

United States v. Williamson, 255 Fed. 2d 512;

Prince v. United States, 352 U.S. 322, 329;

Wilson v. United States, 145 Fed. 2d 734;

United States v. Harris, 97 Fed. Supp. 154.

It is respectfully submitted that a rehearing should be granted and that the judgment herein should be reversed and remanded to the District Court for re-sentencing on Count II of the indictment.

Dated, San Francisco, California,

April 24, 1959.

THOMAS M. JENKINS,

LESLIE GENE MACGOWAN,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
April 24, 1959.

THOMAS M. JENKINS,
*Of Counsel for Appellant
and Petitioner.*

No. 15,948✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VERNON CHAPPELL,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**Appeal from the District Court, District of Alaska,
Third Division.**

BRIEF FOR APPELLEE.

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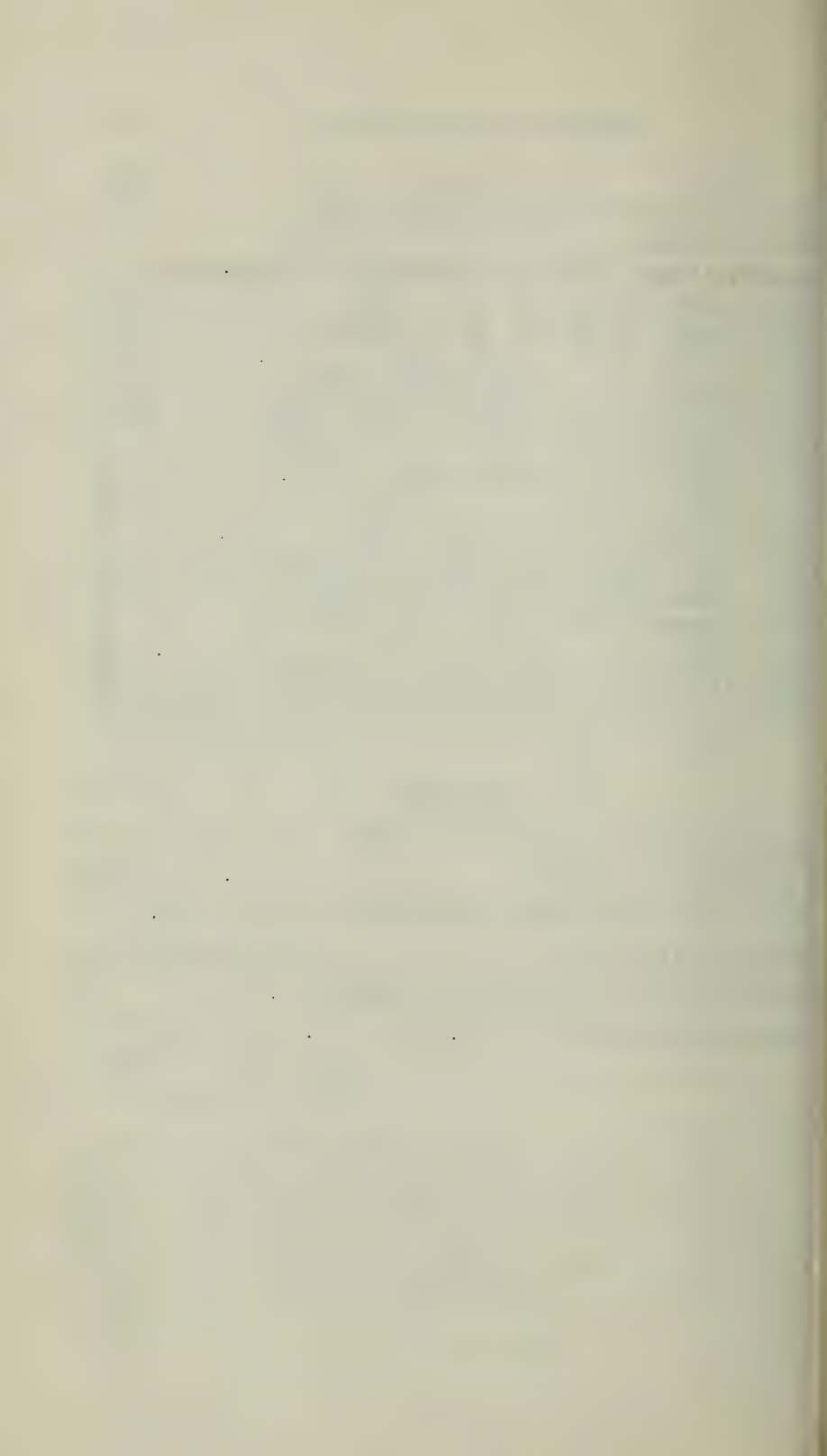
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No. 15,948

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VERNON CHAPPELL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court, District of Alaska,
Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

On April 1, 1957, the Grand Jury filed in the District Court for the District of Alaska, Third Judicial Division, an indictment charging the appellant with violations of section 641 Title 18 U.S.C. The indictment contained six counts. The jury returned a verdict of guilty as to Counts 1 and 5 only.

The District Court had jurisdiction of the indictment and the trial by virtue of the provisions of sections 53-1-1, 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated 1949, and Title 48 U.S.C. section 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of sections 1291 and 1294, chapter 83 Title 25 U.S.C. and section 14 of Public Law 85-508, 72 Stat. 339.

STATEMENT OF FACT.

The appellant was at the time of the offenses involved in this case a Master Sergeant in the United States Air Force assigned to the Headquarters Squadron Section, Alaskan Air Command, Elmendorf Air Force Base, Alaska. The appellant was assigned as Mess Steward of the Headquarters Squadron, Alaskan Air Command at the time he committed the offenses involved in the Counts I and V of the Indictment (R. 916, 917). As to Count I of the Indictment of which the appellant was convicted, the appellee called witnesses, Houston, Messer, Hopper, Sanders, Dugdale, Jones and Palmer. It was proved that for a period of about three weeks from August to September 1956, that an Airman Cline, who was under the supervision of the appellant, worked for the appellant during his normal duty hours. Cline painted several apartments owned by the appellant in Mountain View, Alaska. The overwhelming weight of the evidence proved that Cline performed none of his military duties during the period he was working for the appellant (R. 268, 271, 471, 478 et seq., 638 et seq., 642 et seq., 646, 751 et seq.). The appellant put Cline on sick call to cover the time on one day so he could work

for the appellant on duty hours. Cline did go on sick call and worked for Chappell instead (R. 755). Evidence was presented that the appellant attempted to have the witness Cline change his version of what happened after Cline had testified before the Grand Jury (R. 762). Appellant took the stand in his own behalf and admitted that Cline had worked for him, but denied ever knowingly working Cline on Government time even though he was the Non-Commissioned Officer in charge of Cline and took no action against him when he was absent from his duties for three weeks (R. 968).

As to Count V of the Indictment, of which the appellant was convicted, the appellee called as principal witnesses, Houston, Sanders, Hooper, Wilson, Stone, Palmer, Christianson, and Woods. The evidence demonstrated that the appellant had the furniture set out in Count V of the Indictment and that this furniture was of an unauthorized type for offbase use (R. 722). There was no evidence except the appellant's testimony that the furniture was lawfully issued to him. The appellee dismissed Count VI of the Indictment (R. 865). The jury acquitted the appellant of Counts II, III, and IV (R. 52) and convicted him of Counts I and V (R. 53).

Appellant demanded certain summaries of the testimony of witnesses Ferguson and Houston made by the prosecuting attorney for his use at the appellant's trial under the ruling in the *Jencks* case. The trial Judge ordered all O. S. I. and F. B. I. reports to be turned over but refused to allow the summaries,

made by the prosecuting attorney, to be produced in the respective cases (R. 109-113, 195, 217, 226).

Judgment was duly signed (R. 60, 61). From that judgment the appellant appealed to this Court (R. 63 et seq.).

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO REQUIRE THE WORK NOTES OF THE PROSECUTING ATTORNEY TO BE PRODUCED ON MOTION OF THE APPELLANT.

In his brief, the appellant attempts to stretch the decision of the Supreme Court in *Jencks v. United States*, 353 U.S. 657 (1957) to require memoranda prepared by the prosecuting attorney after an interview with a witness prior to trial to be produced. The appellant does not cite any authorities covering a factual situation similar to the case at bar. In the case of *Jencks v. United States*, *supra*, the court faced the problem of a defendant's right in a criminal trial to have access of reports submitted to the F. B. I. by government witnesses. *Jencks* was convicted of filing a false non-communist affidavit. Two witnesses who testified concerning his alleged communist activities revealed that they had submitted to the F. B. I. contemporaneous reports of their investigations covering the matters as to which they testified. The defendant demanded that these reports be produced for the judge's inspection and, if any inconsistency appeared between the documents and the testimony of their authors, that they be turned over to the defendant

for use in cross-examination. The defendant's request was denied on the ground that no showing of inconsistency between the reports and the testimony had been made. The Supreme Court reversed, holding that a prior showing of inconsistency was unnecessary and that the reports must be given directly to the defendant without any prior screening by the judge. Two concurring Justices disagreed with the majority on the latter point and Mr. Justice Clark dissented.

The record in this case reveals that the statements and summaries given to the F. B. I. and O. S. I. by the witnesses, were freely turned over to the appellant in accordance with the ruling in the *Jencks* case. What is now complained of is the failure of the prosecutor to turn over his work product, prepared by the prosecutor for his use in the prosecution of the case. The memoranda desired by the appellant were made shortly before trial and after indictment in the prosecuting attorney's office. It is obvious from the evidence that the prosecuting attorney was merely preparing himself for the conduct of the trial, and the result of his efforts, was the work product of the prosecutor. The trial court refused to extend the *Jencks* decision to encompass the factual situation in this case. The court stated in substance that he did not feel that the *Jencks* ruling allowed a criminal defendant to peruse the files of the counsel for the government.

Under the Federal Rules of Civil Procedure, the discovery rules are very broad indeed and are given liberal application by the courts. On the other hand,

discovery in the Federal System is a rather limited and restricted right in the hands of a criminal defendant. In the landmark case of *Hickman v. Taylor*, 329 U. S. 495 (1947), Mr. Justice Murphy, speaking for the majority of the court, stated at page 510-512:

“Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the ‘work product of the lawyer.’ Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be de-

moralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted."

The rationale of the Supreme Court in the case of *Hickman v. Taylor* would apply with greater force to the instant case. The fact that *Hickman v. Taylor*

was decided under the Civil Rules would not be material here. The definition of work product in the *Hickman* case would apply with considerable force to the facts of this case. It is clear that what the appellant was trying to do was to obtain the work product of the prosecuting attorney. The *Jencks* case should not be construed to apply to a situation such as this. No case is cited by the appellant which would allow discovery under these circumstances.

This Court in the case of *Harris v. United States* (No. 619, Nov. 6, 1958), stated that a clear violation of the *Jencks* statute was not prejudicial error when the conviction was supported by overwhelming evidence other than that furnished by the witness's testimony. In this connection, even if this Court decides to extend the *Jencks* rule to the situation here involved, it is the contention of the appellee that such error would be harmless for the reason that the conviction of the appellant is supported by overwhelming evidence from other witnesses. The record will reflect that the court was exceedingly liberal in making available to the appellant, statements made by the witnesses to the F. B. I. prior to trial. In any event, any error relating to the memoranda prepared by the prosecutor concerning the witness Ferguson's proposed testimony would be harmless error. His testimony related to no counts of the indictment of which the appellant was convicted.

There is no showing on the part of the appellant that the deletions made by the prosecuting attorney of certain reports was prejudicial to the substantial

rights of the appellant. On the other hand, the record reveals that the rule enunciated in the *Jencks* case, *supra*, was followed by the trial court.

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE MEANING OF CRIMINAL INTENT. THE COURT DID NOT ERR IN REFUSING TO GIVE THE REQUESTED INSTRUCTIONS AS TO CRIMINAL INTENT AS REQUESTED BY THE APPELLANT.

In his brief, the appellant places great reliance in the decision of the Supreme Court in *Morissette v. United States*, 342 U.S. 246, 249, 250 (1952). The factual situation in the *Morissette* case is so different from that in the case at bar as to be of little value. In that case the defendant had openly taken certain government property which he thought was abandoned. He was tried and convicted for "knowingly" converting government property in violation of Title 18 U.S.C. Section 641. The instructions of the trial court eliminated from jury consideration the questions of *mens rea*. Mr. Justice Jackson in the opinion of the court, describes the rulings of the trial court as follows:

" . . . On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: '[H]e took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don't think anybody can have the defense

they thought the property was abandoned on another man's piece of property.' The court stated: 'I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property.' The court refused to submit or to allow counsel to argue to the jury whether *Morissette* acted with innocent intention. It charged: 'And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned, because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.' Petitioner's counsel contended, 'But the taking must have been with a felonious intent.' The court ruled, however: 'That is presumed by his own act'."

The *Morissette* case is distinguishable from the case at bar for the following reasons: In the *Morissette* case the trial judge refused to instruct that criminal intent or *mens rea* was an ingredient of the crime in Title 18 U.S.C. Sec. 641; whereas, in this case the trial judge adequately instructed that criminal intent was an ingredient of the crime charged. In the *Moris-*

sette case, the trial judge for all intents and purposes, directed the jury to bring in a verdict of guilty; whereas, in the instant case the trial judge's instructions, viewed as a whole, adequately stated the law. In the *Morissette* case the trial judge refused to allow the defendant to submit evidence that the defendant acted with innocent intention or to allow that question to be argued to the jury. As is admitted in the appellant's brief and from the record before this Court, the trial judge allowed evidence to be produced by the appellant and other witnesses as to the intent of the defendant and also allowed the matter to be fully argued before the jury.

The *Morissette* case stands for the proposition that felonious intent is an ingredient of an offense under Title 18 U.S.C. Sec. 641. In that respect the Supreme Court read into this statutory offense the common law intent of larceny. The court in that case also condemned presumptive intent sometimes called general intent.

In this case the trial judge instructed as follows in pertinent part:

No. 5

"... Third, that the defendant did knowingly convert to his own use the property or thing of value belonging to the United States. . . .

... Fifth, that the defendant possessed criminal intent in performing the acts which he did, as defined later in this instructions.

You are hereby instructed that the term 'knowingly converts' means that the defendant knew

that the property or thing of value which he converted for his own benefit and use belonged to another—in this case, the United States—and yet knowingly, through such conversion, deprived the Government of its use and benefit.

If the Government has proved each and all of the essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime charged in the indictment, but if the Government has failed to prove any of the essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should acquit the defendant.”

No. 6

“ . . . The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt.”

No. 7

“Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment.”

“In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate

acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result.” (Record 38-40.)

This Court in the case of *Bateman v. United States*, 212 F. 2d 61, 70 (1954) stated:

“As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors. On this question the Court charged the jury that it was incumbent upon the Government to prove beyond a reasonable doubt ‘that there was owing to the government more tax than was shown in the return made by the defendants during the taxable years charged; that the defendants knew that there was owing more income tax than shown by the return; and that they wilfully attempted to evade or defeat any part of such tax by filing or causing to be filed a false return.’ The Court not only specifically charged that intent was an essential element of the offense, that is bad faith, but that good faith was a complete defense.”

In Instruction No. 5 the trial court in this case instructed the jury that knowledge and intent were ingredients of the offenses charged. The court further stated in Instruction No. 5 that the jury had to be satisfied that each of the elements had to be proved beyond a reasonable doubt. In Instruction No. 6 the

trial court charged the jury that the defendant was presumed to be innocent and that the defendant could not be convicted unless the jury was convinced of his guilt beyond a reasonable doubt. In Instruction No. 7 the judge defined criminal intent and told the jury that the defendant could not be convicted unless the jury found from evidence beyond a reasonable doubt, that the defendant intended to commit the offense against the United States.

The appellant cites the case of *Bloch v. United States*, 221 F. 2d 786, 788, 789 (9th Cir. 1955) for the proposition that Instruction No. 7 given by the trial judge in this case, insofar as it relates to presumptive intent is fatal error. However, if the Instructions in this case are analyzed as a whole rather than piecemeal we will find that the Instruction on presumptive intent is not erroneous.

In the later case of *Legatos v. United States*, 222 F. 2d 678, 685 (9th Cir. 1955), this Court found the following Instruction not error when considered in the light of all of the Instructions:

“ ‘The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.’ ”

The court further stated its rationale as follows:

“It is our conclusion that, considered as a whole the Court’s instructions on intent and wilfulness

clearly and correctly stated the law and were not such as to mislead the jury. We conclude, therefore, that the present case is governed by *Bateman v. United States*, supra, and is distinguishable from *Wardlaw v. United States*, supra, and *Bloch v. United States*, supra, where the effect of the court's instructions considered as a whole was not discussed."

It is respectfully submitted that the instructions in the instant case, taken as a whole, clearly and correctly stated the law and were not such as to mislead the jury. This case is closer in its factual aspects to the *Legatos* and *Bateman* cases than the *Bloch* case.

It was not error for the trial judge to refuse to give the appellant's proposed Instructions Nos. 1, 4 and 5 for the reason that these instructions insofar as they correctly state the law, were amply covered by the court's Instructions Nos. 5, 6 and 7.

Since the court was adequately instructed as to the law in this case, the appellant's designations of error Nos. 13, 14 and 15 are without merit.

III. THE TRIAL COURT DID NOT ERR IN FINDING THAT ALBERT CLINE WAS NOT AN ACCOMPLICE AS A MATTER OF LAW. THE COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY THAT CLINE WAS AN ACCOMPLICE, THAT THE TESTIMONY OF AN ACCOMPLICE SHOULD BE VIEWED WITH DISTRUST, AND THAT THE APPELLANT COULD NOT BE CONVICTED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

A. Cline was not an accomplice as a matter of law.

The witness Cline could not be tried for the identical crimes for which the appellant was being prosecuted. It is inconceivable that the witness Cline could have stolen his own services from the United States Air Force within the meaning of Title 18 U.S.C. Sec. 641. In any event, as is conceded by the appellant on page 39 of his brief, it was at most a disputed question of fact as to whether the witness Cline was a willing participant in the alleged conversion. It is well settled that the term "accomplice" does not include a person who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related but distinct offense. The court in *State v. Durham*, 75 N.W. 1127, 1131 (Minn. 1898), stated:

"The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense either as a principal or accessory."

In the case of *People v. Hrdlicka*, 176 N.E. 308, 313 (Ill. 1931), the court held that an election judge who saw the appellant alter ballots and certified the returns were correct when they were not, was not an accomplice, for purpose of corroboration.

The Illinois court defined an accomplice as follows at page 313:

“An accomplice is defined as one who knowingly, voluntarily, and with common intent with the principal unites in the commission of the crime . . . the term accomplice cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was even an admitted participant in a related but distinct offense.”

An examination of the authorities in this case define “accomplice” as one who could be indicted and punished for the crime with which the defendant is charged.

Judge Reed in *ex parte Jackson*, 6 Alaska 726, 730, 731 (1922) stated:

“The great weight of authority is that an accomplice is one who aids and abets or encourages the crime of which the defendant is accused, and the usual test by which to determine whether one is an accomplice is whether or not he could be indicted and punished for the crime with which the defendant is charged, or as it is sometimes expressed, whether his participation in the crime was criminally corrupt.”

This Court in the case of *Stephenson v. United States*, 14 Alaska 603 (1953) declined to depart from the test that said the defendant and the witness had to be both subject to prosecution for the same offense.

In the case at bar, the tests of determining who is an accomplice as set out in the *Jackson* and *Stephen-*

son cases are clearly not met. In the *Stephenson* case, the thief and defendant had entered into an agreement whereby the thief would steal and deliver to the defendant certain specified items.

The appellant has cited a number of cases which may on first glance tend to support his thesis that Cline was an accomplice. However, upon careful analysis of these cited cases it appears that they do not support in any way that thesis.

The case of *Egan v. United States*, 287 Fed. 958 (D.C. Cir. 1923), is cited by the appellant for the proposition that the giver of a bribe is an accomplice of the receiver. The appellee does not concede that this is a correct statement of the law in this jurisdiction in the light of the actual holding in *Stephenson, supra*. The *Egan* case did not involve corroboration but rather the cautionary instruction given in jurisdictions where the common law rule prevails permitting conviction on the uncorroborated testimony of accomplices. The *Egan* case is distinguishable on its facts from the case at bar on these grounds:

(a) The giving of the bribe and the receiving of the bribe was essentially one transaction; whereas, the work done by Cline for Chappell during duty hours were different and distinct transactions. The giver of the bribe gave the bribe involved in that charge; whereas what Cline did did not involve a crime under Title 18 U.S.C. Sec. 641.

This Court in the *Stephenson* case, *supra*, declined to adopt the minority view in the *Egan* case wherein

it would have abandoned the test that an accomplice must be subject to conviction of the identical crime for which the appellant is being prosecuted. There is substantial authority stating that a bribe giver is not an accomplice of the receiver. See: *State v. Turnblow*, 99 Or. 270, 193 Pac. 485 (1921); *State v. Coffey*, 157 Or. 475, 72 P. 2d 35 (1937); *State v. Quinlan*, 41 N.W. 299 (Minn. 1889); *State v. Durham*, 75 N.W. 1127 (Minn. 1898); *State v. Wappenstein*, 121 Pac. 989 (Wash. 1912); *State v. Emmanuel*, 259 P. 2d 845 (Wash. 1953).

The appellant cites the case of *Lett v. United States*, 15 F. 2d 686 (8th Cir. 1926), where the court abandoned the identical offense test and held that the purchaser of narcotics from the defendant (seller) was an accomplice because she was guilty of an offense under the same statute. The soundness of the reasoning in the *Lett* case, *supra*, is doubted by the appellee because it would appear that the buyer of narcotics under the circumstances, would be a victim rather than an accomplice. In *People v. Kinsley*, 5 P. 2d 938, 942 (Cal. 1931), the court reached the opposite and more convincing conclusion that the purchaser of narcotics was not an accomplice of the seller on the grounds that the crimes were not identical when it stated:

“Appellant contends that the complaining witness, Mrs. Longino was an accomplice under Section 1111 of the Penal Code, and that he could not be properly convicted on her uncorroborated testimony. The witness, Mrs. Longino, to whom the morphine was sold, was not an accomplice.”

The burden of proving the witness Cline an accomplice is upon the party invoking the rule namely, the appellant. In this case the appellant failed to show by the evidence that Cline was an accomplice.

In the case of *State v. Akers*, 74 P. 2d 1138 (Mont. 1938), involving theft of a horse, the Supreme Court of Montana said that it was for the jury to determine whether two witnesses who had driven the stolen horse for a price for the defendant were accomplices. At page 1143 of its opinion, the court stated:

“While it is not urged here, the question of whether Summers and Sherrill were themselves accomplices is decisive of whether their testimony was sufficient corroboration under the statute. The exact status of Summers and Sherrill in relation to this crime was one of fact, and it was within the province of the jury to determine, under appropriate instructions, whether these two witnesses were in fact accomplices.”

In the case of *Ripley v. State*, 227 S.W. 2d 26 (Tenn. 1950), the Supreme Court of Tennessee held that where the facts were unclear and in dispute that the question of whether a witness was an accomplice was for the jury's determination. The court said at page 29 as follows:

[“... We think whether or not one is an accomplice in a given case is not a question that is exclusively for the court to determine. By the great weight of authority, ‘The question of who is an accomplice is one for the court when the facts as to the witness’ participation are clear and undisputed, when such facts are disputed or susceptible

of different inferences, the question is one of fact for the jury'.”]

In *Darden v. State*, 68 So. 550, 551 (Ala. 1915), the court stated as follows:

[“The test of the competency of the witness Percy Smoke in this case is: If he was on trial for this offense, would the evidence tending to show his guilt sustain a verdict of guilty? *Bass v. State*, 37 Ala. 569.

The burden of proving the witness to be an accomplice is, of course, upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. 3 Wigmore on Ev. § 2060(c).

And in this case, if the defendant had offered any proof tending to show that the witness Smoke was capable of committing crime, the question as to whether he was or not an accomplice would have been for the jury. . . .”]

There is sufficient authority to support the proposition that whether a witness is an accomplice when the facts of criminal participation in the identical crime are in dispute, then it is for the jury. These cases generally stand for the proposition also that the mere fact that the witness has been indicted for the same crime does not in and of itself make the witness an accomplice. See *Snowden v. State*, 165 So. 410 (Ala. 1936); *Driggers v. United States*, 104 S.W. 1166 (Ind. Terr. 1907); reversed on other grounds 95 Pac. Rep. 612; *Smith v. Commonwealth*, 146 S.W. 4 (Ky. 1912); *Deaton v. Commonwealth*, 163 S.W. 204 (Ky. 1914); *Slusser v. State*, 232 S.W. 2d 727 (Tex. 950).

It is clear from the evidence that Cline could not have been convicted under Sec. 641, Title 18 U.S.C. If Cline were involved in the identical crime, the burden was on the appellant to present the evidence tending to show his criminal participation. This, the appellant failed to do.

Since Cline could not be convicted of the identical crime for which the appellant was charged, then it was not error to so instruct. It also follows that none of the other instructions were required since Cline was not an accomplice within the meaning of Section 66-13-59 ACLA 1949.

B. Even if this Court finds that Cline was an accomplice as a matter of law, or that whether Cline was an accomplice was a question of fact to be determined by the jury, there was abundant corroboration in the record outside Cline's testimony to make any error committed by failing to instruct harmless.

The appellant took the stand in his own behalf and admitted that Cline had worked for him even though he denied ever knowingly working Cline on government time. Other evidence was presented by a number of witnesses to corroborate the testimony of Cline in all respects. The question of sufficiency of corroboration has been resolved in a number of decisions. In almost all of these cases the corroboration was far less convincing than in the instant case. See: *People v. Nikolich*, 269 Pac. 721, 722 (Cal. 1928); *People v. Knoth*, 295 Pac. 277 (Cal. 1931); *People v. Allen*, 279 Pac. 349 (Cal. 1928); *People v. Wayne*, 264 P. 2d 547 (Cal. 1953); *State v. Vigil*, 260 P. 2d 539 (Utah 1953); *State v. Pointer*, 213 Pac. 621 (Or. 1923); *Bliss v.*

State, 287 Pac. 778 (Okla. 1930); *State v. Rasmussen*, 63 N.W. 2d 1, 34 (Minn. 1954); *State v. Moore*, 177 P. 2d 413, cert. den. 332 U.S. 763 (Or. 1947); *State v. Brown*, 231 Pac. 926 (Or. 1925); *State v. Brake*, 195 Pac. 583, 585 (Or. 1921); *State v. Rosser*, 91 P. 2d 295, 299 (Or. 1939).

This Court has refused to reverse a conviction on the failure to instruct on accomplice testimony where the court found substantial corroboration of the accomplice's testimony in the record. *Nordgren v. United States*, 181 F. 2d 718, 722 (9th Cir. 1950); *Christy v. United States* (9th Cir. No. 15970, Nov. 18, 1958, unreported at this date).

There was no evidence in the record indicating that the witnesses for the appellee, Wilson, Sanders and Houston, were accomplices of the appellant. Absent any showing whatsoever that they could have been convicted of the identical crime of which the appellant was charged, no instruction was warranted. Even if it was determined that the instruction was required in one form or the other, it was not error for the reasons stated above because there was ample corroboration of their testimony in the record. Therefore, the appellant's designations of errors Nos. 8, 9, 10 and 17 are without merit.

IV. THE VERDICTS AS TO VALUE WERE SUPPORTED BY SUFFICIENT EVIDENCE.

The appellant's designations of error Nos. 5 and 6 are without merit. Captain Woods testified that the

retail value of the furniture was \$412.00 and its cost to the government was \$252.94. The fact that the jury came in with a lower special verdict as to value did not prejudice any of the rights of the appellant. Moreover, there is no indication that the computation of the jury as to the value of the furniture involved in Count 5 of the indictment was the product of compromise. The conclusion of the jury in this regard was supported by the evidence (R. 712-713).

The prosecution introduced evidence as to the value of Cline's services. This evidence was sufficient to support the jury's special verdict. Cline testified fully as to his earnings during the three week period in which he was working for the appellant (R. 767-770).

In the case of *O'Malley v. United States*, 227 F. 2d 332, 335, 336 (1st Cir. 1955), Judge Magruder states as follows:

“ . . . 18 U.S.C. § 641 provides that whoever steals or knowingly converts to his own use or the use of another, or without authority sells or otherwise disposes of, anything of value belonging to the United States shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; ‘but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.’ The section then defines the word ‘value’ as meaning ‘face, par, or market value, or cost price, either wholesale or retail, *whichever is greater.*’ [Italics added.] It is pointed out by appellants that in Count 2, for example, the cost to the government of the manual chain hoist was alleged to have been in excess

of \$100.00, though, according to the evidence, it was sold by defendant O'Malley for the sum of \$45.00, which may perhaps have been its fair market value at the time of such sale. Appellants urge that to make the doing of an act punishable in the greater degree of larceny, depending upon the original cost of the article stolen rather than upon its value at the time, is repugnant to Amendment VIII of the Federal Constitution, which prohibits the imposition of 'excessive fines' or of 'cruel and unusual punishments,' because the severity of the penalty is greatly disproportionate to the offense charged.

"We regard this constitutional argument as far-fetched and frivolous. The Congress, in defining the crime of larceny of government property, is not obliged to perpetuate the details of the ancient common law distinction between grand and petit larceny. The prescription in § 641 of maximum limits to the amount of fine or imprisonment which the judge may at his discretion impose, depending upon the circumstances of the offense, is characteristic of most of the offenses defined in Title 18 of the U.S. Code, and certainly does not constitute cruel and unusual punishment. Section 641 would have been within the constitutional power of Congress even if it had not provided for a lower maximum penalty or fine for a lower maximum penalty of fine or imprisonment in case the 'value' of the property, as defined, does not exceed the sum of \$100.00."

The verdict should not be disturbed. Moreover, there is no showing that the verdict as to value was obtained by compromise.

V. MISCELLANEOUS ERROR.

In addition to the errors discussed above, the appellant has designated as error assignments 1, 2, 3, 4, 7 and 18. Needless to say, the appellant has not deemed these alleged errors of sufficient importance to discuss them in his brief.

Assignments of error 1 through 4 are without merit because the defendant's convictions of Counts 1 and 5 are supported by the overwhelming weight of the evidence. Therefore, the motion for judgment of acquittal was properly denied. Assignment of error No. 7 which relates to the alleged error of the court in limiting cross-examination of several witnesses, is without merit and should not be considered by this Court because the appellant has not specified wherein the court erred.

CONCLUSION.

The errors complained of on this appeal are without merit. The trial court properly refused the appellant the right to see certain pretrial memoranda prepared by the prosecuting attorney as not being within the scope of the rule in the *Jencks* case. Any construction of the *Jencks* case which would allow a criminal defendant to obtain the work notes of the prosecutor would be highly reprehensible. The court adequately instructed the jury that the crime charged in the indictment required specific criminal intent. The instructions of the Judge taken as a whole, correctly stated the law. It was not error for the Judge to refuse to instruct that the witness Cline was an accom-

plice. The witness Cline could not have been convicted of the identical offense involved in Count I of the indictment against the appellant. Even if it was error for the court to refuse to instruct that Cline was an accomplice, that error would be harmless because the appellant's conviction as to Count I of the indictment was amply supported by the evidence. Finally, there is adequate evidence to support the verdict of the jury as to both Counts I and V as to value. Since there are no errors substantially affecting the rights of the appellant, the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
March 24, 1959.

Respectfully submitted,

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See also: Vol. 3084

No. 15,954

**United States Court of Appeals
For the Ninth Circuit**

EDWARD LEWIS SHORT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court for the
District of Alaska, First Division.**

BRIEF OF APPELLEE.

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No. 15,954

United States Court of Appeals For the Ninth Circuit

EDWARD LEWIS SHORT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was tried by a jury in the District Court for the District of Alaska, First Judicial Division at Ketchikan on a charge of bribery, in violation of §65-7-4 ACLA 1949. He was convicted upon a verdict of guilty and was sentenced to five years' imprisonment, four and a half of which were suspended, with the defendant being placed on probation for that period. Appellant filed a notice of appeal from the judgment and sentence imposed by the court.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

The defendant was tried on an indictment charging him with bribery in violation of §65-7-4 ACLA 1949.

The principal witness for the government was Walter O. Smith, an officer of the Ketchikan Police Department who was well acquainted with one Edward Clifford Bolton, a bartender at the Totem Bar in Ketchikan (R. 64).

Smith testified that during March, 1957 Bolton advised him that he was going to go on a vacation and while he was gone, would look up some "girl friends" who might be willing to come to Alaska for the purpose of prostitution (R. 79). On March 18 Bolton returned to Alaska and advised Smith that he had arranged for a girl to come to Ketchikan. He requested that Smith contact the Chief of Police for him to see if a "set-up" could be arranged (R. 79).

Smith reported the incident to the Chief of Police who immediately reported the matter to the Assistant United States Attorney in Ketchikan (R. 80).

Smith was directed to continue to investigate the matter (R. 65, 78). The Alaska Territorial Police, the Federal Bureau of Investigation, the U. S. Marshal, and the City Manager were advised and consulted about the case (R. 65-67).

Smith made daily reports of his activities (R. 67).

In the course of the investigation, Bolton advised Smith that the defendant, Edward Short, a co-owner of the Pioneer Bar in Ketchikan wanted to talk to Smith about opening a gambling game in his bar

(R. 67). Smith did nothing about the invitation and one to two weeks passed (R. 37, 68). Bolton asked him again if he had seen Short.

Finally the subject of the original investigation was sufficiently completed to justify the filing of criminal charges. At that time, since Smith's reports had shown Short's interest in talking with Smith, the Assistant U. S. Attorney instructed Smith to contact Short and "see if a bribe or a proposition of any kind was open" (R. 69).

Smith contacted Short at the Pioneer Bar at approximately 2:30 on May 7, 1957 (R. 70). He conversed idly with Short for about 45 minutes, and when nothing happened, he decided to leave. As he started to leave, Short said "Don't run off Smitty. I want to talk to you a minute" (R. 70).

Short then said, "I understand that the town is going to open up. I would like to open a two and four game in the back" (R. 71). He then asked Smith how much it would cost, and when Smith said he didn't know, Short suggested ten or fifteen per cent (R. 72).

Smith said he would check with the Chief of Police (R. 72). The Chief of Police suggested, obviously as a means of immediately securing physical evidence of the bribe, that Smith tell Short that it would be one hundred dollars a week or ten per cent, whichever is more, but one hundred dollars in advance (R. 73).

The terms of the "counter offer" were written on a piece of paper and delivered by Smith to Short

(R. 73). Shortly thereafter, in the wash room of the Pioneer Bar, Short delivered five twenty dollar bills to Smith (R. 74). The money was produced at trial as Plaintiff's Exhibit No. 1. Smith reported immediately thereafter to the United States Attorney's Office (R. 75).

Short's defense consisted—in addition to character witnesses who testified to his good reputation despite Short's conviction involving gambling and unlawful sale of liquor—of his own statement claiming that the conversations with Smith were attended by his partner, Ivan Jones (R. 193), and that he had refused to deal with Smith (R. 195). Jones corroborated this, saying that on Smith's first visit he observed the conversation between Smith and Short at the end of the bar, saw Smith conducted to the door entering on the card room, but not into the room, and then back to the bar. He stated that he then walked to the end of the bar and joined Short and Smith "very shortly" (R. 246) or within the time it takes to walk down to the end of the bar (R. 253). He claims that he heard Smith "proposition" Short, and heard Short reject the proposition.

Lucas tends to support this statement.

On rebuttal, the government produced Eugene O'Brien of the Territorial Police who testified that he was in the bar during Smith's first visit—didn't see Jones at all (R. 291), saw Short and Smith enter the card room and disappear from sight for as much as 20 minutes (R. 289) and return to the bar and was joined by no one (R. 291) although he remained in

the bar and continued to watch for as long as 10 to 15 minutes (R. 291), thus tending to discredit the testimony of Jones and Lucas.

SUMMARY OF ARGUMENT.

I. A. Denial of the motion to dismiss the indictment for failure to endorse on it the names of the grand jury witnesses did not constitute reversible error. This court has previously stated that the Alaska statute requiring such endorsement has been abrogated by the federal rules of criminal procedure. Furthermore, appellant has completely failed to sustain his burden of showing that the failure to endorse the names of the grand jury witnesses on the indictment substantially prejudiced him.

I. B. The trial judge correctly denied appellant's motion to dismiss the indictment based upon his appearance before the grand jury. Evidence adduced at the hearing on this motion establishes that he appeared before the grand jury on his own initiative, that he had consulted his attorney about doing so, and that he knew of his rights. He suffered no prejudice as a result of his testimony.

II. A. The trial judge properly allowed the government to introduce additional portions of officer Walter O. Smith's reports under the doctrine of testimonial completeness, after parts of those reports had been used in cross-examination.

II. B. Evidence of particular wrongful acts of officer Walter O. Smith and T. H. Miller was inad-

missible for the purpose of showing a pattern of conduct or for the purpose of impeachment.

III. Instructions Nos. 17 and 18 were correct and proper statements of the law relating to this case.

I. A. DENIAL OF THE MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO ENDORSE THE NAMES OF THE WITNESSES APPEARING BEFORE THE GRAND JURY DID NOT CONSTITUTE REVERSIBLE ERROR.

As the appellant concedes at p. 12 of his brief this point has been decided contrary to his argument in the case of *Soper v. United States*, (9 Cir. 1955) 220 F2d 158. The court stated:

“... the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54 (a) (1) of said rules, as amended by the Supreme Court's order of December 28, 1948, 335 U.S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative” 220 F2d at p. 159, postnote 2.

In view of this precedent the trial court correctly ruled that endorsement of the Grand Jury witnesses on the indictment was unnecessary.

Rule 7(c) provides in part:

“The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. *It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement . . .*” (Emphasis supplied).

The provision that it shall be signed by the attorney for the government demonstrates that it is not merely a “rule of pleading” as appellant contends. Furthermore, the statement of the court in the *Soper* case was not that Section 66-8-52 ACLA 1949 conflicts only with Rule 7(c), as appellant’s argument assumes. Also to be considered is the requirement of Rule 6(e) that

“ . . . (A) juror, attorney, interpreter, or stenographer may disclose matters occurring before the Grand Jury *only* when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury” (Emphasis supplied).

Likewise Rule 16, relating to discovery and inspection is another possible area of conflict with the Alaska procedure.

However, an exhaustive discussion of this matter is unnecessary in view of the inescapable conflict between the mandatory nature of §66-11-1 ACLA 1949 and the provision of Rule 52(a) that

“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”

Since no prejudice to appellant is alleged and none appears in the record, the error, if any, must be disregarded. See *Zamloch v. United States* (9 Cir. 1952) 193 F2d 889; *Steele v. United States* (5 Cir. 1957) 243 F2d 712, 715.

While we strongly contend that the failure to endorse the names of the grand jury witnesses on the indictment does not constitute reversible error, nevertheless if the court considers it necessary to overrule the *Soper* case, we urge the adoption of the technique of over-ruling prospectively as the court did in *Sunburst Oil and Refining Co. v. Great Northern Ry. Co.*, 7 P.2d 927 (Mont. 1932), affirmed 287 U.S. 538 (1932); *People v. Mangles*, 86 P. 187 (Cal. 1906); *People v. Ryan*, 92 P. 853 (Cal. 1907); and *Odom v. State*, 94 So. 233 (Miss. 1922). Because of the reliance placed on the *Soper* case by the courts and prosecutors in Alaska and the absence of any substantial harm to appellant, we submit that fairness requires this solution if *Soper* is to be over-ruled.

I. B. THE TRIAL JUDGE CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED UPON HIS APPEARANCE BEFORE THE GRAND JURY.

A proper understanding of Appellant's Point I. B. requires reference to the supplement to the record, "Reporter's Transcript of Hearing on Defendant's Second Motion to Dismiss the Indictment."

The appellant was indicted by the grand jury on October 28, 1957 for the crime of bribery. Up to this time the appellant had made no appearance before the grand jury (R. 314, 328).

Because of word received by certain members of the grand jury it was deemed desirable to hear complaints against the local police department by certain persons (R. 315, 322, 327). The proceeding was not a prosecutive matter and was not done on the advice of the United States Attorney (R. 315-316, 322). Subpoenas were not issued for this purpose and the parties thought to have grievances were merely invited to appear before the grand jury and express their views. Among the persons invited was the appellant (R. 315, 322).

Prior to accepting the invitation, appellant consulted with his attorney in Anchorage (R. 318, 326, 329) and apparently with local counsel as well (R. 326).

He then appeared before the grand jury fully prepared with exhibits to support his arguments (R. 324, 325). After a few preliminary questions he launched into a lengthy criticism of the Ketchikan Police Department (R. 316-317, 324). In the course of this testimony he voluntarily and without any questions

from the United States Attorney or the members of the grand jury entered into a discussion of the subject matter of his indictment (R. 317, 324).

When the United States Attorney questioned him further on these matters, he declined to answer and demanded as a condition to his further testimony that the United States Attorney be excluded from the room (R. 317, 325). Thereafter, and with the United States Attorney excluded from the room, the appellant resumed his criticism of the local police (R. 325). Neither the motion to dismiss nor the appellant's brief, nor anything advanced in behalf of the appellant has asserted that this episode in any way contributed to the indictment or conviction of the defendant.

In short, the appellant's argument is that a grand jury, bent on achieving justice by investigating police officials, in the abstract, and against the wishes of the United States Attorney, may, by affording an already indicted defendant an opportunity to be heard in a separate and distinct matter, so violate the defendant's rights that a dismissal of the indictment is required even though the defendant appeared on advice of counsel, did in fact assert his right to refuse to testify, and did not in any way prejudice his case. To state the proposition is to establish its invalidity. It is thoroughly understandable that the appellant has been unable to find a parallel case.

There have been numerous cases, however, concerning the testimony of defendants before grand juries, and several issues appear to be well-established.

First, there is apparently no duty to advise the ordinary witness before the grand jury of his privileges under the 5th Amendment.

“The privilege against self-incrimination is neither accorded to the passive resistant nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause. Its benefits can be retained only by sustained combat. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a belligerent claimant in person”—*United States v. Johnson*, (D.C. M.D. Pa. 1947) 76 F. Supp. 538 at 540.

People v. Bermel, 128 NYS 524 p. 525 (Defendant's Brief, p. 31).

There are cases holding that an indictment obtained *after* the defendant has testified under subpoena before the grand jury without first being advised of his rights is subject to dismissal.

“The Fifth Amendment to the Constitution provides that no person shall be compelled to be a witness against himself and a proceeding before a grand jury for the purpose of determining whether or not a crime has been committed is a criminal case within the meaning of the constitutional provision (*Counselman v. Hitchcock*, 142 US 547, 35 L. ed. 1110, 12 S.Ct. 195). The defendant cannot be subpoenaed by nor sworn before the grand jury even though he fails to claim his constitutional privilege against self-incrimination unless he waives, with a full understanding of the nature of his act, his constitutional privilege against self-incrimination (*U.S. v. Edgerton*, 80 F 374). Failure to claim the privilege is not a waiver. The defendant must be apprised of his

right (*U.S. v. Westmore*, 218 F 227). His testimony otherwise constitutes illegal evidence, invalidates the indictment, and is sufficient ground upon which to set the indictment aside.”—Housel, *Defending and Prosecuting Federal Criminal Cases* (2nd Ed. 1946), §215, at page 285.

There are also cases holding that even in such a case the indictment is not subject to dismissal unless the defendant actually asserted his privilege and was nevertheless compelled to testify. *U. S. v. Mangiaracina* (D.C. W.D. Mo., 1950) 92 F. Supp. 96. Apparently the indictment is not subject to dismissal where the defendant actually understood the extent of his rights. *Connelly v. United States*, 249 F2d 576, 581.

A compelling argument against appellant's position is stated in *United States v. Smyth* (D.C. M.D. Calif., 1952) 104 F. Supp. 283 where Judge Fee said

“If the rule were as stated, a United States Attorney could grant immunity to a criminal simply by calling him as a witness. For many years, the overwhelming weight of authority has held that the privilege against self-incrimination is a personal one and must be claimed and stood upon in order to be effective . . .” 104 F. Supp. at 307.

Therefore, it can be seen that there can be little merit in the appellant's assertions in this case, where the purpose of the inquiry was collateral to the criminal proceeding against the defendant, where the testimony was given after the indictment was returned, and when the defendant had the benefit of advice of counsel before testifying and actually knew of his

right to refuse to testify to matters that might be of an incriminatory nature.

In this connection, the United States Supreme Court held in *Powers v. United States* (1912) 223 U.S. p. 303 that failure to warn a defendant of the fact that the testimony could be used against him did not invalidate evidence of his testimony at a preliminary hearing.

It is submitted that the reason for dismissal of an indictment obtained after the defendant has testified about incriminating matters where such a rule prevails is that the indictment is obtained, at least in part, on unlawfully obtained evidence, and should not be allowed to stand. However, if incriminatory testimony is obtained after indictment without adequately informing the defendant of his rights, his rights would certainly be protected by exclusion of evidence so obtained. Since no such evidence was introduced or sought to be introduced in this case, the matter would be academic.

II. A. THE TRIAL JUDGE PROPERLY ALLOWED THE GOVERNMENT TO INTRODUCE ADDITIONAL PORTIONS OF OFFICER WALTER O. SMITH'S REPORTS UNDER THE DOCTRINE OF TESTIMONIAL COMPLETENESS, AFTER PARTS OF THOSE REPORTS HAD BEEN USED IN CROSS-EXAMINATION.

Appellant's Point II. A. actually raises two separate and distinct issues.

First, Appellant has requested that the officers' reports of Walter O. Smith be examined to determine

the correctness of the ruling of the trial judge in deleting certain portions of the reports before delivering them to appellant's attorney pursuant to 18 U.S.C. §3500.

An examination of the matters deleted discloses that these matters had nothing to do with the bribery charged in the indictment. Most of these matters pertained to items of hearsay concerning other persons alleged to be involved in vice conditions but against whom no charges were pending for lack of evidence.

Second, Appellant asserts that it was error for the District Court to permit the United States Attorney to read to the jury the complete reports of officer W. O. Smith after cross-examination by the appellant's attorney utilizing fragments of these reports. Title 18 U.S.C. §3500, the so-called "Jencks Law" merely defines a procedure whereby the defendant in a criminal case can obtain material to use in cross-examining witnesses for the government. Nothing in the law suggests that the rules of evidence pertaining to the use of materials so obtained are in any way changed.

In a pre-Jencks law case, *Affronti v. United States* (8 Cir. 1944) 145 F2d 3, the defendant in a narcotics case requested a copy of the Narcotic Inspector's official report for the purpose of cross-examination. The defendant then sought to discredit the testimony of the inspector by showing that his official report was in conflict with his present testimony. On re-direct examination, counsel for the government read into evidence portions of the report showing that the inspector had reported to his superiors that pur-

chases of morphine had been made from the defendant by an informer who had died prior to trial. As such, some of the statements read into evidence were inadmissible as substantive evidence—and were probably of a very damaging character. Nevertheless the court said, at page 7 of 145 F2d:

“... The portions of the report, however, which were admitted on redirect-examination were not received as substantive evidence, but to show that the official report and the inspector’s testimony were not in as serious conflict as might have been inferred from the cross-examination. We think the evidence complained of by the defendant was admissible on the important issue of the credibility of the inspector.”

This is an application of the rule of testimonial completeness as outlined in the reference to *Wigmore on Evidence* in Appellant’s brief (pp. 36-37). See also *United States v. Weinberg* (2 Cir., 1941) 121 F2d 826.

That this rule is valid in Alaska is demonstrated by the case of *Bennett v. United States* (9 Cir. 1956) 16 Alaska 325, 234 F2d 675 which case is unquestionably distinguishable from the present case, but where the court nevertheless said (page 678)

“... Afterwards, the defendant’s attorney took the written statement, ‘O’, and asked Miss Casey about other portions of it not theretofore inquired about by the prosecutor. At this point, the court was then entitled to put the whole statement before the jury, on the prosecutor’s request.”

In *Jones v. United States* (9 Cir. 1908) 162 F. 417 (428-432); cert. den. 212 U.S. 576, a criminal prosecu-

tion for conspiracy to defraud the United States, the court said in connection with an assertion of error arising out of admission of an entire sworn statement by the prosecutor after fragmentary use of the statement on cross-examination:

(page 432) “. . . The declared purpose of counsel for the defendants being to show by isolated statements read by them from a previous sworn statement of the witness that he had therein made statements contradictory of his testimony on the trial, and thereby to affect his credibility, we are of the opinion that the court rightly admitted in evidence the entire statement that the jury might correctly weigh the evidence of the witness.”

In the present case, counsel for appellant cross-examined the witness W. O. Smith extensively about his dealings with the witness Bolton. While there might be considerable doubt about the relevancy of these prior transactions, the appellant is hardly in a position to assert such irrelevancy in view of the emphasis he placed on these transactions during the cross-examination of Officer Smith (R. 116-126).

In fact, the reports were used almost exclusively by counsel for appellant to cross-examine Smith on his transactions with Bolton prior to the events charged in the indictment. The impression apparently desired was that Smith had been involved in an elaborate and perhaps unlawful association with criminals involving repeated efforts to obtain a “pay-off” in any of several varying sums (R. 121-124). The fragmentary quotations from the investigation report of Officer Smith tended to support the impression. Only by

reading the entire report was it possible to place the fragmentary items in their proper context. Actually, only the portions of the report admitted by the District Court were those pertaining to days actually discussed in the cross-examination (R. 151).

Finally, it is to be noted that in the transcript at page 166 it is made clear by counsel for appellant in examining Smith that nothing in the reports was substantive evidence against Short.

For the reasons outlined, it is submitted that there is no merit in the appellant's Point II. A.

II. B. THE COURT PROPERLY EXCLUDED THE TESTIMONY OF HAROLD E. SMITH AND LIMITED THE CROSS-EXAMINATION OF T. H. MILLER.

The testimony sought to be elicited from Harold E. Smith was to the effect that at the Totem Room of the Stedman Hotel, Officer Walter Smith had made a suggestion concerning opening the town, and that on another occasion, Officer Smith had approached him on the subject of using the 400 Club as a "bootleg joint" (R. 277-284). Disregarding for the moment the requirement that evidence showing prior similar conduct must indicate a definite pattern before it may be admitted to prove the doing of a particular act, it is clear that the only theory which such evidence would support in this case is that Officer Smith had entrapped the appellant. But appellant denied that he had ever offered or given any money to Officer Smith. In a similar case, *Brown v. United States*,

(9 Cir. 1958) 261 F2d 848, 850, the appellant, although denying that he had made the sale of narcotics for which he was convicted, asserted that the government had suppressed certain evidence which would show that if he had made the sale, he had been entrapped. Judge Denman stated for the court:

“Appellant took the position at trial that he was at home on the night of the alleged sale and that he had not sold narcotics since 1953. He could not thereafter have properly raised the defense of entrapment even had Jackson’s testimony provided some basis for the defense. As we said in *Eastman v. United States*, 212 F2d 320, 322, (Cir. 9):

‘(2) Assignment of error No. 2 deals with the refusal of the Court to instruct on entrapment. Appellants, to say the least, take a very inconsistent position in this respect. Appellants have maintained throughout that they did not commit a crime. It logically follows that absent the commission of a crime there can be no entrapment. *Bakotich v. United States*, 9 Cir. 1925, 4 F2d 386. The trial court understood this situation and very properly refused to inject into the case a question which could have no other result than to confuse’.”

The same objection applies to the cross-examination of T. H. Miller, whereby the appellant attempted to show that Miller had previously been involved in a scheme to entrap one Linn Kirkland (R. 177-181). In each instance the proposed testimony had no bearing on any fact in issue and could very possibly have misled the jury.

Furthermore, as previously mentioned, when the doing of a particular act is sought to be shown by evidence of prior similar acts, the court must first find that the evidence of prior conduct is sufficient to establish a pattern or common plan. On this subject, Dean Wigmore states:

“304. *Theory of evidencing Design or System.* When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person’s Design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similiarity, which suffices for evidencing Intent. The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a preexisting design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of Intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.

The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are*

naturally to be explained as caused by a general plan of which they are the individual manifestations. Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative innocent intent; but where the very act of uttering is disputed—as, where the defendant claims that his identity has been mistaken—, and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance.” (Emphasis in original.)

It is not entirely clear upon what basis the appellant now relies in urging the relevance of this evidence, but it is apparent that at the trial he offered it as impeachment and to show pattern. During the argument concerning the testimony of Harold E. Smith, Mr. Kay said:

“In other words it is both impeachment and affirmative to show Smith’s approach, a matter which we feel is highly relevant. If he approached this man in that manner at the Totem Bar, isn’t it logical for us to claim he approached Bolton and Short in the same way.” (R. 279.)

In arguing the propriety of cross-examining T. H. Miller concerning Linn Kirkland, Mr. Kay said:

“And my reason for asking those questions, and I anticipate Mr. Miller, never having denied any of this, he would not deny it here, is I believe it would tend to show a pattern of design on the part of the Chief of Police here now, Mr. Miller.

It would show a possible motive or a possible explanation of what happened to Mr. Short here, he having been on friendly terms with the former Chief of Police, Mr. Potter, whom Mr. Miller replaced, and, therefore, critical (160) of the firing of Mr. Potter and the hiring of Mr. Miller. That is all I have to say.” (R. 178.)

Certainly the isolated acts involved here are inadequate to show a pattern of conduct. The court properly refused to admit them for that purpose.

It should also be pointed out that in Alaska the impeachment of a witness by the opposing party is governed by the provisions of §58-4-61 ACLA 1949, which reads:

“Impeachment by adverse party: Evidence permissible. A witness may be impeached by the party against whom he was called, by a contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime.”

The evidence relating to particular wrongful acts of Officer Walter Smith and T. H. Miller is clearly inadmissible for the purpose of impeachment under the provisions of this statute.

III. THE COURT'S INSTRUCTIONS NOS. 17 AND 18 ARE CORRECT STATEMENTS OF LAW AND WERE PROPERLY GIVEN IN THIS CASE.

Instruction No. 18, relating to admissions or incriminatory statements alleged to have been made by a defendant, was based upon the statutory requirement that the jury “. . . be instructed by the court on all proper occasions: . . . Fourth. That the testimony of an accomplice ought to be viewed with distrust and of the oral admissions of a party with caution.” §58-5-1 ACLA 1949. The record clearly shows the justification for the instruction. For example, these statements appear in Edward Clifford Bolton's testimony:

Q. And what did he say?

A. He just nodded and said that he may be interested in opening up a “two and four.”

Q. A “two and four?”

A. Yes (R. 35) . . .

Q. And then what else happened on that occasion?

A. He just told me to send the man around. (R. 36) . . .

Q. Then Mr. Short replied, and isn't this correct, “Well, if you want to send them over, or send him over, or send them over, I will talk with them. I might be interested in a ‘two and four’ game,” or words to that effect?

A. Words to that effect; yes. (R. 50) . . .

Walter O. Smith's testimony includes these statements:

Q. Well, then you say you were getting up to leave, and what happened then?

A. Mr. Short made the remark, he said, "Don't run off. I would like to talk to you," or, "I want to talk to you for a minute," so I sat back down, and he said, "I understand that the town is going to open up," and he said, "I would like to open up a 'two and four' game in the back."

Q. What did you say?

A. And so I told him that might be possible, and he made the remark, "I had heard the town was going to be opened up," and he wanted to know what it would cost . . . (R. 71, 72) . . .

Q. So, when you went back to the bar with this note, tell us what happened then?

A. I went back and, as I say, I explained to Mr. Short the conversation that I had had with the Chief, and he said, "Well, I want to talk it over with my partner a minute," so he went out the front of the bar and he was gone approximately four or five minutes and he came back and he said, "It is O.K. with my partner" (R. 73)

. . .

A. . . . when I was in the washroom Mr. Short came in and he handed *we* five twenty dollar bills, and he said this one hundred dollars was to apply on the first week after District Court closes. (R. 74) . . .

Furthermore, the instruction was entirely favorable to the appellant, and it is unreasonable to presume that the jury would interpret it in such a manner as to prejudice him.

Concerning Instruction No. 17, relating to the evaluation of a defendant's testimony, it is sufficient to cite this court's recent decision in *Stapleton v.*

United States (9 Cir. 1958) 260 F2d 415, wherein a similar instruction was approved.

CONCLUSION.

Appellant has had a trial free from error, the court's rulings below were sound, and the jury which found the appellant guilty was correctly instructed on the applicable law. It is respectfully submitted that the judgment and sentence below should be affirmed by this court.

Dated, Juneau, Alaska,
April 24, 1959.

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See also Vol. 2884

Nos. 15,959 and 15,960

United States Court of Appeals
For the Ninth Circuit

CHENG FU SHENG,

Appellant,

vs.

BRUCE G. BARBER, as District Director
of Immigration and Naturalization
Service, San Francisco,

No. 15959

Appellee.

LIN FU MEI,

Appellant,

vs.

BRUCE G. BARBER, as District Director
of Immigration and Naturalization
Service, San Francisco, and

No. 15960

DAVID H. CARNAHAN, as Regional Com-
missioner of the Immigration and
Naturalization Service,

Appellees.

BRIEF FOR APPELLANTS.

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FILED

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PAUL P. O'BRIEN, CL

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Nos. 15,959 and 15,960

**United States Court of Appeals
For the Ninth Circuit**

CHENG FU SHENG,

Appellant,

vs.

BRUCE G. BARBER, as District Director
of Immigration and Naturalization
Service, San Francisco,

No. 15959

Appellee.

LIN FU MEI,

Appellant,

vs.

BRUCE G. BARBER, as District Director
of Immigration and Naturalization
Service, San Francisco, and

No. 15960

DAVID H. CARNAHAN, as Regional Com-
missioner of the Immigration and
Naturalization Service,

Appellees.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

These are appeals from judgments of the District Court entered on January 16, 1958, denying the relief sought by appellants and dismissing their actions (T., Cheng Transcript 24; T., Lin Transcript 23-24). In the case of the appellant, Cheng Fu Sheng (No.

15959), who had been taken into custody by the Immigration and Naturalization Service prior to the commencement of this action, there was filed in the District Court on April 29, 1957, a petition for a writ of habeas corpus. (T., Cheng 4.) Said petition sought review of the final administrative order denying Cheng's application for adjustment of status to that of an alien lawfully admitted for permanent residence pursuant to Section 6 of the Refugee Relief Act of 1953, as amended. Jurisdiction of the District Court to entertain the petition for writ of habeas corpus is conferred by 28 U.S.C. 2241 et seq. Jurisdiction is also conferred upon the District Court by Section 10 (a)(b) of the Administrative Procedure Act (5 U.S.C. 1009 (a)(b)).

In the case of the appellant, Lin Fu Mei (No. 15960), an action for declaratory judgment was filed in the District Court on April 30, 1957. (T., Lin 5.) Like Cheng, Lin sought review of the final administrative order denying his application for adjustment of status to that of an alien lawfully admitted for permanent residence pursuant to Section 6 of the Refugee Relief Act of 1953, as amended. The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201) and under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

Jurisdiction of the Court of Appeals to review the judgment of the District Court in the case of the appellant, Cheng Fu Sheng, is conferred by 28 U.S.C. 2253. Jurisdiction of the Court of Appeals to review

the judgment of the District Court in the case of appellant, Lin Fu Mei, is conferred by 28 U.S.C. 1291.

STATUTE INVOLVED.

Section 6 of the Refugee Relief Act of 1953, as amended (67 Stat. 403 (1953), as amended, 50 U.S.C.A. Appendix 1971(d)) provides as follows:

“Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves

the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted to the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eightieth Congress, second session (62 Stat. 6); *Provided Further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."¹

BACKGROUND OF THE REFUGEE RELIEF ACT OF 1953.

The legislative history of the Act² evidences Congress' concern with the political, social and economic

¹Prior to amendment, relief was limited to the alien who could establish that "persecution or fear of persecution" resulted from events which occurred subsequent to his entry into the United States.

²50 U.S.C.A. Appendix 1971-1971q.

problems created by the many thousands of persons left homeless as a result of the emergence of new totalitarian states after World War II. The Act was designed, in part, to alleviate over population pressures abroad and to thereby further the objectives of American foreign policy. Primarily, however, the Act had the humanitarian purpose of providing a permanent home to those unfortunate individuals who, either abroad or in the United States, had nowhere to turn but toward a dictatorship. Congress' desire to afford relief to the victims and potential victims of the oppression of totalitarianism is expressed throughout the Report of the House Judiciary Committee on House Bill 6481.³

The Act provides for the issuance of immigration visas to refugee aliens outside the United States as well as making it possible for certain aliens within the United States to adjust their status to that of a lawful permanent resident. The alien abroad who applies must fit within certain categories defined by the Act. The matter of determining whether an application for a visa under the Act shall be granted to a refugee alien outside the United States is left entirely to the administrative agencies of the Federal Government. On the other hand, aliens within the United States who apply for adjustment of status under Section 6 of the Act, need not fit within the categories set up under the other provisions of the Act. If they meet the requirements of Section 6, the Attorney Gen-

³House Report 974, U.S. Code Cong. Adm. News, 83rd Congress, 1st Session, Vol. II, page 2103 et seq.

eral, acting through his designated representatives, must report to Congress all the pertinent facts in the case. Determination of eligibility is the sole function conferred upon the Attorney General by Section 6. Congress has reserved to itself the function of determining whether the application shall be granted as a matter of discretion.

Cheng Fu Sheng v. Barber, 144 F. Supp. 913 (D.C. Cal. 1956);

Chien Fan Chu v. Brownell, 247 F. 2d 790, 793, 101 U.S. App. D.C. 204 (1957).

In this respect, Section 6 is clearly distinguishable from other immigration statutes granting discretionary relief such as Section 243 (h) of the Immigration and Nationality Act of 1952. (8 U.S.C. 1253 (h).)⁴ Speaking of the contrast between the two provisions, the Court in *D'Antonio v. Shaughnessy*, 139 F. Supp. 719 (D.C. N.Y. 1956), stated at pages 722 and 723 as follows:

“While both deal with the problem of a deportee facing deportation to a country wherein he may be persecuted, under Section 1253(h) the immigrant must show fear of ‘*physical persecution*’ (emphasis supplied by court), and even then the action on the part of the Attorney General in staying deportation is apparently at his *discretion* (emphasis supplied by writer). On the other hand, under Section 1971(d), enacted subsequent to Section 1253(h), it is sufficient that the alien

⁴“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to physical persecution and for such period of time as *he deems to be necessary* for such reason.” (Emphasis supplied.)

show 'persecution or fear of persecution on account of race, religion, or political opinion,' and it is apparently *mandatory* (emphasis supplied by writer) upon the Attorney General that he submit the matter to Congress for further action if he finds facts supporting the existence of the statutory condition."

Section 6 has uniformly been construed liberally in order to effectuate its remedial purpose.

Shio Han Sun v. Barber, 144 F. Supp. 850 (D.C. Cal. 1956);

D'Antonio v. Shaughnessy, *supra*;

Chien Fan Chu v. Brownell, *supra*.

STATEMENT OF THE CASE.

Appellants are natives and citizens of China. Both enlisted in the Chinese Nationalist Air Force and served in China until the overthrow of the Republic of China by Communist forces. Thereafter, they were transferred with their military units to Formosa. The appellants entered the United States as officers of the Chinese Nationalist Air Force for the purpose of receiving military training here. Both left their military units and have since remained in the United States because of their political convictions.⁵

⁵"On November 3, 1952, he (Cheng) voluntarily presented himself to the Immigration and Naturalization Service and explained that he had deserted his airforce unit and remained in the United States because he considered the Chinese Nationalist Government to be a corrupt dictatorship to which he could no longer give his allegiance.

.

He (Lin) was subsequently arrested in deportation proceedings and testified in such proceedings that he had deserted his airforce

The appellant, Cheng Fu Sheng, filed his application for adjustment of status under Section 6 of the Act on November 3, 1953. A hearing was held by an examining officer of the Immigration and Naturalization Service in order to determine whether the appellant was eligible for the benefits of Section 6.⁶ In a decision dated September 12, 1955, the examining officer recommended denial of the application on the grounds that:

1. Appellant had committed a crime involving moral turpitude, to wit, desertion, and was therefore inadmissible to the United States under the Immigration and Nationality Act, and

2. Appellant's country of last residence was Formosa and he was not unable because of fear of persecution on account of race, religion, or political opinion to return to that country.

On Appeal to the Regional Commissioner of the Immigration and Naturalization Service, the recommended decision of the examining officer was disapproved. The Regional Commissioner ruled that Cheng had been present in Formosa solely because of military orders and it, therefore, followed that the country of his last residence was China. The Regional Commissioner also concluded that desertion was not a crime involving moral turpitude, and that Cheng was not inadmissible to the United States by reason

unit and remained in the United States because he considered the Chinese Nationalist Government to be totalitarian in character and a police state." (*Cheng Fu Sheng v. Barber*, supra, at page 914.)

⁶8 C.F.R. 245 (a).

of having committed such a crime. However, the Regional Commissioner in his decision of October 4, 1955, did rule that Cheng was ineligible for the benefits of Section 6 on the ground that he was not a person of good moral character in view of his desertion. Subsequently, on October 11, 1955, a Motion to Reopen proceedings was filed on behalf of Cheng to afford him the opportunity to establish good moral character. Said motion was granted on October 19, 1955, and the case was remanded to the District Director for further hearing.

Additional evidence was received in a reopened hearing and on December 9, 1955, the examining officer of the Immigration and Naturalization Service again recommended denial of Cheng's application. On this occasion, denial was recommended for the reason that Cheng is of a class of aliens which Congress did not intend to come within the purview of the Act. On appeal to the Regional Commissioner, it was ordered that Cheng's application be denied in accordance with the recommendation of the examining officer. Thereafter, on July 12, 1956, a complaint was filed in the United States District Court for declaratory judgment seeking review of the final order of the Regional Commissioner. In a consolidated opinion⁷ under date of September 28, 1956, the Honorable Louis E. Goodman granted motions for summary judgment and remanded to the Immigration and Naturalization

⁷*Cheng Fu Sheng v. Barber*, supra.

Service for further proceedings in both the case of Cheng Fu Sheng and the case of Lin Fu Mei.⁸

After conducting further hearings in both cases, the examining officer of the Service again recommended that the applications be denied in decisions dated March 18, 1957. In both cases the ground for denial was that appellant's country of last residence is Formosa and that he can return there without fear of persecution on account of his political opinion. The recommended decisions of the examining officer in both cases were approved by the Regional Commissioner under date of April 19, 1957. (T., Cheng 13; T., Lin 13.)

Cheng was taken into custody by the Immigration and Naturalization Service on April 26, 1957, and his petition for a writ of habeas corpus was filed in the District Court on April 29, 1957. Lin filed his complaint for a declaratory judgment in the District Court on April 30, 1957. In both actions, appellants sought review of the final orders of the Regional Commissioner entered on April 19, 1957. The District Court denied the relief sought by appellants and dismissed their actions. (T., Cheng 24; T., Lin 23-24.)

⁸Appellant Lin Fu Mei filed his application under Section 6 on December 23, 1954. His application was denied by the Regional Commissioner on February 1, 1955, in accordance with the recommendation of the examining officer who found that Lin, like Cheng, was of a class of aliens which Congress did not intend to come within the purview of the Refugee Relief Act. An action for declaratory judgment was filed in the District Court on July 17, 1956, in Lin's case.

SPECIFICATION OF ERRORS.

Appellants have specified the following points on which they intend to rely on this appeal:

1. The Court erred in finding that the appellants' place of last residence is Taiwan (Formosa).
2. The Court erred in finding that appellants are able to return to Taiwan (Formosa) without persecution or fear of persecution on account of race, religion or political opinion.
3. The Court erred in concluding that the appellants become ineligible for the benefits of Section 6 of the Refugee Relief Act upon termination of their status as bona fide non-immigrants in the United States. (T., Cheng 26-27; T., Lin 25-26.)

ARGUMENT.

I. RESIDENCE.

Eligibility for relief under Section 6 of the Act depends, in part, upon a determination of the country in which the applicant last resided prior to his admission into the United States. The applicant must establish that "... he is unable to return to the country of his ... last residence because of persecution or fear of persecution. . . ." Throughout the course of administrative proceedings and in the Court below appellants have contended that their country of "last residence", within the meaning of Section 6, is China, not Taiwan (Formosa). It is submitted that the appellees erroneously construed Section 6 in finding that appellants'

country of last residence is Taiwan. The final administrative decisions state, in pertinent part, as follows:

“It is believed that members of the Armed Forces of China should be placed in the same category as other Government Officials holding official positions in Formosa (Taiwan). As the Chinese Nationalist Government has possession of Formosa and is there indefinitely it is believed that the residence is in Formosa.” (T., Cheng 12; T., Lin 12.)

The above language indicates that the finding of the appellees is based upon a concept of “residence” which has no place within the context of Section 6. Appellees evidently had in mind the term, “official residence”, denoting the residence of a government official for jurisdictional purposes, service of process, and other official acts. It may be that the appellants had an “official residence” in Formosa in view of the fact that they were members of the Armed Forces of the Chinese Nationalist Government and that government was located on Formosa. It does not follow, however, that appellants’ country of “last residence”, within the meaning of Section 6, was Formosa.

Obviously, “official residence” is not the equivalent of “residence”, as used in Section 6 of the Act. In enacting the latter provision, Congress intended that “residence” have a much broader meaning than the term “official residence” is accorded. Generally, the interpretation of the word “residence” depends upon the context in which it is used.

“It is axiomatic that residence is not a term of fixed legal definition but takes on shades of mean-

ing according to the statutory framework in which it is found.”

Kristensen v. McGrath, 179 F. 2d 796, 801, affirmed, 340 U.S. 162.

Although the Refugee Relief Act of 1953, as amended, contains no definition of “residence”, Section 15 of the Act⁹ provides as follows:

“Except as otherwise expressly provided by this Act, all of the provisions of the Immigration and Nationality Act shall be applicable under this Act.”

Section 101 (a)(33) of the Immigration and Nationality Act¹⁰ reads:

“The term ‘residence’ means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.”

As defined above, “residence” cannot be equated with physical presence, nor with domicile. It lies in the area somewhere in between these two concepts. In considering a somewhat comparable provision, “resident within”, the Supreme Court held that the term, “implies something more than mere physical presence and something less than domicile. . . .” *Guessefeldt v. McGrath*, 342 U.S. 308, 312 (1952).

No definition of residence fails to take into account the individual whose physical presence in a particular country is the result of compulsion and not a matter

⁹50 U.S.C.A. Appendix, 1971 (m).

¹⁰8 U.S.C.A. 1101 (a)(33).

of choice. Courts have always attached considerable significance to physical presence resulting from compulsion. A case in point is *In re Yarina*, 73 F. Supp. 688 (D.C. Ohio 1947), involving the interpretation of a naturalization statute. After acknowledging that naturalization statutes must be strictly construed, the Court nevertheless went to the extent of holding that the petitioner had not been absent from the United States for a continuous period of one year or more within the meaning of the statute. The petitioner's absence in this case was occasioned by his capture and subsequent incarceration in a Japanese prison camp for more than one year during the period in question.

Volition as a factor of primary importance in determining residence has been recognized under a variety of statutes. One of the leading cases is *Neuberger v. United States*, 13 F. 2d 541 (C.C.A. 2, 1926), holding that a petitioner for naturalization fulfilled the requirement of residence in the United States for a continuous period of five years previous to his application where, during a substantial part of the period in question, he had been detained in Germany and forced to serve in the German Army. After discussing the distinction between residence and domicile, Judge Learned Hand stated at page 542, as follows:

“But there is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it.”

The Court of Appeals, in *Kristensen v. McGrath*, supra, dealt with residence in the United States pur-

suant to the Selective Training and Service Act of 1940, insofar as this matter affected the alien's eligibility for suspension of deportation. Holding that the alien lacked the necessary volition to reside within the United States, the Court stated at pages 801-802, as follows:

“But wherever used, the term has an irreducible minimum of meaning. As we shall indicate, it requires at least an abode which is in some degree permanent and is the result of choice.

. . . .

Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence.”

In affirming the decision of the Court of Appeals in the above case, the Supreme Court stated:

“When we consider that Section 3(a) was obviously intended to require military service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders *made necessary by the conditions of the times* was residence within the meaning of the statute.” (Emphasis supplied.)

McGrath v. Kristensen, 340 U.S. 162, 175-176 (1950).

Construing the term, “resident within”, as found in the Trading with The Enemy Act, the Supreme Court ruled that an alien who was involuntarily detained in Germany from 1938 until July of 1949 was not a

“resident within” Germany since his physical presence was under physical constraint.

Guessefeldt v. McGrath, 342 U.S. 308 (1952).

The principle enunciated in the above cases undoubtedly applies to members of the Armed Forces of any nation, and this is especially so if that nation is at war. Even during peace time, when it is expected that a serviceman may have some choice as to where he is stationed, our courts have held that his presence in a particular place pursuant to military orders does not change the residence which he had at the time he entered the service.

Kinsel v. Pickens (1938), 25 F. Supp. 455;

Wise v. Bolster (1939), 31 F. Supp. 856.

Indeed, the Regional Commissioner, in his original decision of October 4, 1955, relating to appellant Cheng, conceded that volition is a primary factor in determining “last residence” within the meaning of Section 6. Said decision states, in pertinent part, as follows:

“The applicant, through counsel, has filed exceptions to the proposed recommendation contending first that China and not Formosa is the place of the applicant’s last residence. The record establishes that during the applicant’s stay on the island of Formosa he was an officer in the Chinese Nationalist Air Force and that his presence was the result of military orders. The applicant has stated that he considered his home to be the mainland of China. It is concluded that the applicant’s last place of residence is China, and the

first ground of denial recommended by the Immigration Officer is therefore not approved.¹¹

The issue of what is meant by "last residence", as that term appears in Section 6 of the Act, was squarely presented in *Chien Fan Chu v. Brownell*, supra. Appellants, husband and wife, had resided in China until their arrival in Formosa on November 28, 1948. Their departure to Formosa was occasioned by the imminent threat of an invasion of their homeland by Communist Forces. They lived in Formosa until August of 1949, when the husband departed for the United States and the wife left for Hong Kong. During their stay in Formosa, appellants were making arrangements for the husband's eventual departure to the United States. Their applications for adjustment of status under Section 6 of the Act were denied by the Regional Commissioner on the ground that because they could have remained in Formosa, that country will be considered their country of last residence. The Court held that the Regional Commissioner had erroneously construed "last residence" and that appellants' "last residence" as a matter of law was China, and not Formosa. The basis of the Court's decision was the temporary nature of the appellants' stay in Formosa and the fact that their presence in that country was made necessary by the conditions of the times. At page 795, the Court states:

¹¹This decision has never been expressly overruled by appellees. While it is recognized that the doctrine of *res judicata* is not strictly applicable to administrative tribunals, uniformity of administrative decisions is nevertheless desirable.

“Formosa looms large as, but only as, a temporary place of asylum pending completion of the formalities requisite for entry into the United States.”

Thus, the Court recognized the importance of the element of volition in determining country of “last residence” within the meaning of Section 6 of the Act.

In *Chien Fan Chu*, it was also pointed out that Congress had used “foreign residence” in Section 7(d) of the Act advisedly with the intention of distinguishing between this term and “last residence” found within Section 6 of the Act. The concept of “official residence”, applied to appellants herein as the criterion for determination of their country of “last residence”, is no more warranted by the statute than is the concept of “foreign residence”. If such erroneous concepts are rejected and the proper test is applied, we believe that the undisputed facts contained in the administrative record establish as a matter of law that the appellants’ country of last residence is China. The salient facts are parallel in all important respects with those in the cases cited above which deal with physical presence resulting from compulsion. Unquestionably, the sole reason for appellants’ physical presence in Formosa was that they were ordered to go there by their military superiors. They had absolutely no contact with Formosa prior to their assignment there. China is their birthplace and they had always lived there until the Chinese Communists forced them to evacuate to Formosa. Appellants lived in military barracks while stationed on Formosa. They

have never acquired property of any kind in Formosa which would tend to identify them with that country. Appellant Cheng has a wife and child who are now in Formosa. His wife fled from Nanking, China, her birthplace, just prior to the arrival of the Communist forces, taking two suitcases to Formosa with her. She has made application as a refugee for the issuance to her of an immigration visa at the office of the American Consul at Taipeh, Formosa. Appellant Lin has no relatives in Formosa.

The facts relating to country of "last residence" in these cases are uncontroverted. Therefore, the problem of determining truth or falsity of evidence is not presented herein. Nor is there any problem of weighing one fact against another to determine whether substantial evidence exists to support the administrative finding. The only question presented, insofar as the issue of "last residence" is concerned, is a question of law. We submit that the appellees have erroneously construed "last residence", as that term is employed within Section 6 of the Act. We further submit that under the proper interpretation of "last residence" the undisputed facts contained in the administrative record require a finding as a matter of law that appellants' country of "last residence" is China.

II. PERSECUTION OR FEAR OF PERSECUTION.

Section 6 of the Act requires an applicant to establish that:

"... he is unable to return to the country of his birth, or nationality, or last residence because of

persecution or fear of persecution on account of race, religion, or political opinion. . . .” (Emphasis supplied.)

Appellants have contended at all stages of these proceedings that they are unable to return to both China and Formosa because of *persecution or fear of persecution* on account of their political opinion. It is unnecessary to discuss the factor of persecution with reference to China, inasmuch as appellees have never denied that appellants would be subject to persecution if returned to China. In the event this Court should decide that Formosa is appellants’ country of “last residence,” within the meaning of Section 6, the subject of persecution with reference to Formosa would be an issue since appellants’ eligibility for relief would then depend upon their establishing that they have a rational basis for fearing persecution upon their return to Formosa. In the following discussion it will be assumed for the purpose of argument that Formosa is appellants’ country of “last residence.”

The appellees’ finding that appellants are able to return to Formosa without fear of persecution is based entirely on a letter dated January 8, 1957, from the Chinese Consul General of San Francisco. The final administrative decision states:

“Under date of January 8, 1957 the Chinese Consul General in San Francisco officially advised this Service that his Government had directed him to declare that according to their law this applicant is subject to prosecution for desertion upon his return to Taiwan. He will face a trial in an or-

derly, judicial process, in which there will be a formal indictment and the defendant is permitted to be defended by lawyers, including the right to cross-examine witnesses against him. If convicted he will be subject to punishment according to Article 93 of the Criminal Code governing the personnel of the Army, Navy, and Air Force of the Republic of China, the maximum sentence being imprisonment for not more than 3 years. The allegation that he will be subject to persecution or death sentence is entirely groundless." (T., Cheng 11-12; T., Lin 11-12.)

A letter, identical in kind to the one referred to above, was characterized as entirely lacking in evidentiary value in the case of *Sang Ryup Park v. Barber*, 107 F. Supp. 605 (D.C. Cal. 1952), where at page 607, the Court said:

"Nor should a statement, solicited by the delegate of the Attorney General from the diplomatic representative of such nation, that the alien would not be persecuted there, suffice. *No other reply* (emphasis supplied by Court) could reasonably be expected. By it, the Attorney General did not receive any more evidence or information about conditions in Korea than he had theretofore. Such a statement obviously could be obtained for the asking in every case in which the Attorney General is required to make a finding. It is not the sort of evidence, upon which a solemn finding, involving human life, should depend."

Yet, other than the letter from the Chinese Consul General, the record is devoid of any evidence that even tends to support the conclusion that appellants

can return to Formosa without fear of persecution on account of their political opinions. Appellants, on the other hand, have submitted overwhelming evidence, consisting of both testimony and documents, which substantiates their claim of persecution or fear of persecution. Perhaps the most important evidence in the administrative record relating to persecution in Formosa is the sworn statement of Dr. K. C. Wu, who testified at the Chicago office of the Immigration and Naturalization Service on August 16, 1954. Dr. Wu served as Governor of Formosa from December 21, 1949, until April 16, 1953, at which time he resigned. He is probably the only individual today who has sufficient knowledge and courage to reveal the inside operation of the Chinese Nationalist Government. At page 5 of Dr. Wu's statement, he describes how "Democratic Centralization" works in the Kuomintang and how it results in absolute power being vested in Chiang Kai Shek. Democratic Centralization is, of course, the same political theory that the Governments of Communist China and Communist Russia have utilized. These Governments, like the Formosan Government, have all the trappings of a democracy. Theoretically, the constitution is the supreme law of the land. Supposedly free elections are held, and nominally, ultimate control is vested in the people. Actually, however, all of these institutions are a facade behind which reposes one individual who wields complete control.

Dr. Wu's sworn statement and his magazine article,¹² which was also entered into the administra-

¹²"Your Money has Built a Police State in Formosa", Look Magazine, June 29, 1954.

tive record, describe the gradual ascendancy of the Secret Police in Formosa. Under the leadership of Chiang Ching Kuo, Chiang Kai Shek's son and the heir apparent to his throne, the Secret Police have assumed increasingly more functions until it can now be said that that organization dominates all governmental departments in the Formosa Government. Dr. Wu, at page 11 of his sworn statement, states that:

"The Secret Police was not under my control directly, but because of my prestige, I should say and because of my position over there, I did quite a bit where ever I could. I met with quite a lot of opposition. I fought a battle and gradually it was a losing battle in the end, but I did it. I think now my successors are what I call the typical yes men, so I think they will not dare to do anything about the secret police now."

When asked to characterize the present government of Formosa, Dr. Wu at page 14 of his sworn statement said that it is, "A dictatorship and police state, just a plain dictatorship and a plain police state. The people like me who knows the inside knows the truth." Dr. Wu also told of the mass arrest of 398 Formosans without legal process and for purely political purposes.

It is clear from Dr. Wu's statement that instances of brutal treatment of political critics by the secret police in Formosa are not the exception but the rule. His own son, Wu Hsiu-Huang, was held as a political hostage for more than a year on Formosa and was finally released only because of unfavorable world opinion. At page 15 of his statement Dr. Wu de-

scribes an incident which is of special significance because of its similarity to the instant cases. A pilot deserted from the Chinese Nationalist Air Force in 1951 because of dissatisfaction with the Government. Seeking political asylum in Okinawa and volunteering to join the United States Air Force in order to effectively fight Communism, he was returned to Formosa and executed by the Formosan Government.

The only rational conclusion that can be drawn from the evidence of record is that the government of Formosa is a dictatorship, and as such, it is committed to silencing its critics by the use of persecution. This conclusion leads inevitably to the further conclusion that appellants herein have a rational basis for fearing persecution by the government of Formosa on account of their political opinions. The record adequately reveals their political opposition to the government of Formosa.

It should be pointed out that no confidential information or extra record facts were considered in arriving at appellees' decisions in these cases. This was made clear in respondent's reply brief submitted in the Court below on May 10, 1957, wherein it is stated at page 2 as follows:

"The petitioner's Reply Brief quotes from the record of proceedings, page 22, regarding an understanding by counsel that only the evidence of record will be considered in reaching 'your decision' (speaking to the examining officer). The Respondent has ascertained that no confidential information was made use of in arriving at the decision, and the entire record has been submitted."

As discussed above, Section 6 of the Act vests no discretionary power in the Attorney General. Therefore, the findings of appellees do not involve the exercise of discretion. Considering the whole record as it relates to persecution or fear of persecution in Formosa, it is submitted that the findings of the appellees are "unsupported by substantial evidence" and are "arbitrary" and "capricious" within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009, (e)).¹³ Even prior to enactment of the Administrative Procedure Act, this court has on occasion set aside the findings of the Immigration Service on the ground that they were "purely arbitrary".

Gung You v. Nagle, 34 F. 2d 848 (C.C.A. 9, 1929).

It is significant that the District Court made no mention of persecution in its consolidated opinion denying relief to appellants. Evidently, the District Court did not consider making a finding on this subject until counsel for appellants asked if such a finding would be made at the hearing on modification of findings of fact. The following conversation then took place:

"The Court. No, I am not making any finding on that at all. I would be ruling in a vacuum if I did that. I have no means of knowing. We have some letters, which are not very persuasive, from the Chinese Consul, that they would be

¹³See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487, 488 (1950).

given a fair trial and possibly a three-year sentence.

Mr. Hargreaves. We are faced with one more problem, then, your Honor. If your Honor is not prepared to rule on that issue—of course, he does not need to establish actual persecution, but only fear of persecution, under the statute—I think there is no question about it; he certainly has fear of prosecution——

The Court. He has a reasonable fear of being prosecuted for desertion, even though it may be a technical desertion. He has to face trial.

Mr. Hargreaves. That is not the fear which he has. I mean because of the political——(15)

The Court. What you mean to say is that he has a reasonable fear that he is going to be persecuted because of his political antipathy toward Chiang Kai Shek.

Mr. Hargreaves. That is correct, your Honor, and because of his actual actions against him. And, of course, if you uphold the government's finding that his last official residence was Formosa, then there is still the question, well, if he has established a reasonable fear of return to Formosa, he is still eligible for relief under the Refugee Relief Act.

Mr. Grant. Your Honor, I hope I did not mislead you. There is a conclusion in here that the petitioner is not eligible for consideration under Section 6, since he can return to his place of residence, Taiwan, Formosa, without fear of persecution on account of race——

The Court. Oh, yes, that is in there. I remember that. All I have that is tangible to go on is the letter of the Chinese Consul.

Mr. Hargreaves. In opposition to that there is, of course, not only the man's own testimony, but there is Wu, a former governor, and there is the former testimony of two former Army officers. There is a great deal of direct evidence in there as to the conditions that existed in Formosa, and it would not be a prosecution for the crime of desertion, but punishment or death because of his political opposition.

The Court. If I were to hold that he has a (16) reasonable fear of persecution because of his political beliefs, then I would have to hold that he is eligible for relief under the Refugee Act, and I cannot hold that. I simply cannot, in logic, in reason, hold that, in view of the evidence taken administratively which has been before me.

Mr. Hargreaves. If he has a reasonable fear, then he is eligible. At least it should be sent to Congress and let Congress decide it.

Mr. Grant. There must be a distinction between whether he has a fear and whether his fear is objectively valid. He may have that fear, but we have no concrete evidence.

The Court. As a man I can appreciate his apprehension about going back there, but, as Mr. Grant has pointed out, objectively I have no evidence upon which to predicate that. That is a complete answer. In fact, there is some evidence to the contrary. Frankly, as a man, I would not believe it.

Well, there is nothing I can do but sign the judgment that is submitted, and the findings. . . ." (T., vol. II, 45-47.)

It is believed that the District Court in making its findings pertaining to persecution in these cases, relied upon an erroneous standard of proof. In agreeing with Mr. Grant's statement that, "he may have that fear but we have no *concrete evidence*", the Court was concerned with the fact that ". . . *objectively* I have no evidence upon which to predicate that." Neither the statute nor the regulations suggest that any special type of evidence or that any higher quantum of proof need be offered by an applicant under Section 6 to establish persecution or fear of persecution. Undoubtedly, the trier of the facts may experience some difficulty in ascertaining whether an applicant fears persecution, inasmuch as the determination of this fact rests in some degree upon the applicant's subjective attitude. But whether the finding concerns "fear of persecution" or such an objective matter as "physically present in the United States on the date of the enactment of this Act," the quantum of proof and the type of evidence is the same. In neither case does the statute require *concrete* evidence or *objective* evidence. We believe that both the District Court and the appellees have erred in requiring a different type of evidence and imposing a higher quantum of proof upon appellants than is authorized by the statute.

It is submitted that the evidence of record allows but one reasonable conclusion, and that is, that the appellants have a rational basis for fearing persecution upon their return to Formosa on account of their political opinions.

III. DEPORTABILITY.

The District Court's second conclusion of law in both cases is that:

"Upon the termination of his status as a bona fide non-immigrant within the meaning of Section 6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act." (T., Cheng, 22; T., Lin, 22.)

This conclusion is in accordance with the consolidated opinion of the District Court which states:

"Upon the well reasoned authority to be found in *Wei v. Robinson*, a case decided by the United States Court of Appeals, Seventh Circuit, June 28, 1957 (246 F. 2d 739) the relief sought by the petitioners, and each of them, is hereby denied." (T., Cheng 16; T., Lin 16.)

The only similarity between the *Wei* case, relied upon by the District Court, and the instant case is that Wei, like the appellants herein, was a member of the Chinese Nationalist Armed Forces and entered the United States for training purposes. The sole issue in the *Wei* case was whether an alien admitted to the United States prior to the effective date of the Immigration and Nationality Act of 1952, who fails to maintain his non-immigrant status, is subject to deportation under the provisions of Section 241(a)(9) of the Immigration and Nationality Act of 1952. While the Court's opinion in the *Wei* case indicates that Wei had filed an application under Section 6 of the Refugee Relief Act, his eligibility for the benefits of Section 6 was not determined or even discussed by the Court.

The only reference to the term "bona fide non-immigrant", appearing in Section 6 is in connection with an applicant's entry into the United States. The statute expressly provides that the applicant must have, ". . . lawfully entered the United States as a bona fide nonimmigrant. . . ." No language can be found within Section 6 which even suggests that an applicant must maintain his non-immigrant status subsequent to his entry in order to be eligible for relief. Nothing in the legislative history of the Act supports the conclusion that Congress intended to preclude relief from aliens found deportable for failure to maintain their non-immigrant status in the United States. Undoubtedly, Congress realized that the majority of applicants would be aliens who had violated their non-immigrant status because they had had to remain in the United States longer than originally planned. For this reason, the only requirement exacted by the statute is that the applicant, "lawfully entered the United States as a bona fide nonimmigrant."

At no time have the Immigration authorities suggested that the appellants were ineligible for relief under Section 6 because they were subject to deportation for failure to maintain their status as bona fide non-immigrants. Appellants have conceded that they were deportable throughout the administrative proceedings. By filing their actions in the District Court they had no intention of raising any issue with respect to the validity of the deportation orders or the regularity of the deportation proceedings. These actions

were limited to seeking review of the final administrative orders finding them ineligible for the benefits of Section 6. However, the consolidated opinion of the District Court would indicate that the sole issue involved in these cases was whether the final orders of deportation relating to appellants were valid, an issue which, in fact, was not before the Court.

Finding no lack of procedural due process and that the deportation orders were valid, the District Court felt impelled to deny the relief sought by appellants, although the hope was expressed that his judgments would be reversed by the Court of Appeals. (T., 2, 47-48.) That the District Court believed that relief was foreclosed to appellants because they had been accorded procedural due process and the final orders of deportation were valid is borne out by reading as a whole the reporter's transcript of the Hearing on Modification of Findings. (T. 2, 33 *et seq.*) We respectfully submit that the District Court erred in basing the judgments in these cases upon appellants' termination of status as bona fide non-immigrants.

CONCLUSION.

For the reasons set forth above, we submit that the judgments below should be reversed.

Dated, San Francisco, California,
March 20, 1959.

Respectfully submitted,

FALLON AND HARGREAVES,
Attorneys for Appellants.

See also Vol. 3085

No. 15,986 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELRICK RIM COMPANY, a copartnership
consisting of M. C. Elrick and M. B.
Champlin,

Appellant.

vs.

READING TIRE MACHINERY CO., INC., a
corporation, and RALPH R. READING,
an individual,

Appellees.

**PETITION FOR A REHEARING ON BEHALF OF APPELLANT,
ELRICK RIM COMPANY, A COPARTNERSHIP, CONSISTING
OF M. C. ELRICK AND M. B. CHAMPLIN.**

MELLIN, HANSCOM & HURSH,

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This court's decision is incorrect, as a matter of law, because an important and critical part of Reading's invention is the use of a pressure in the independent stream of air to the spray gun of from 150 to 200 pounds; the language of the Reading claims is free from ambiguity; therefore the claims must, without reference to the specifications, particularly point out and distinctly claim the invention	2
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OF M. C. ELRICK AND M. B. CHAMPLIN.**

*To the Honorable Stanley N. Barnes, Frederick G. Ham-
ley and Gilbert H. Jertberg, Circuit Judges of the
United States Court of Appeals for the Ninth Circuit:*

The appellant, above named, feeling itself aggrieved
by the opinion filed in this Court on March 4, 1959, comes
now and respectfully petitions for a rehearing limited to
the following question:

Is it proper, as a matter of law, to refer to the specifi-
cations of a patent to limit the claims to "particularly

point out and distinctly claim" an identifiable invention or discovery when said claims are free from ambiguity?

THIS COURT'S DECISION IS INCORRECT, AS A MATTER OF LAW, BECAUSE AN IMPORTANT AND CRITICAL PART OF READING'S INVENTION IS THE USE OF A PRESSURE IN THE INDEPENDENT STREAM OF AIR TO THE SPRAY GUN OF FROM 150 TO 200 POUNDS; THE LANGUAGE OF THE READING CLAIMS IS FREE FROM AMBIGUITY; THEREFORE THE CLAIMS MUST, WITHOUT REFERENCE TO THE SPECIFICATIONS, PARTICULARLY POINT OUT AND DISTINCTLY CLAIM THE INVENTION.

The Court in its opinion, pages 4 and 5, said that the use of the application pressure in the independent air line in the 150-200 pound range and the obtaining of an emulsion effect in the rubber cement were the new techniques of the Reading process, stating:

"The high pressure in the independent air line, as taught by Reading, reaches a magnitude of from one hundred fifty to two hundred pounds per square inch. This makes possible the application of an exceedingly thin coating of rubber cement which dries quickly, thereby saving time and avoiding the dust, moisture, and health hazards associated with former methods. The utilization of high air pressure in the bypass line also aids in overcoming the 'cobwebbing' effect to which reference has been made. In addition the high air pressure utilized in the Reading process causes the mixture to attain and retain an air volume above the flammable limits of the solvent. The need of extreme care to avoid the danger of fire or explosion is thus overcome."

* * * * *

“In paint spraying the application of air pressure in the independent air line in the 150 to 200-pound range is unnecessary and in fact undesirable. Likewise, there is no advantage in obtaining an emulsion effect where paint is to be sprayed. *In these two particulars Reading teaches a process not contemplated by Shelburne, Gradolph or McLean.*”¹

The Court, in its opinion, went on to say the following at page 10:

“The trial court concluded that the use which Reading made of the known paint spraying devices was not analogous to the uses for which they were originally designed. The Court based this conclusion on its findings of fact *that Reading was the first to use excess air pressure in the independent air line* and to obtain emulsion within the tank of liquid, both of these techniques being undesirable in the case of spray painting. In our view these two variances are sufficient to warrant the conclusion that Reading teaches a nonanalogous art and is therefore a ‘new’ use of a known machine within the meaning of §100 (b).”

Again the Court continued to stress the importance of the excess pressure in the independent stream of air on pages 11 and 12 of its opinion, where it said:

“* * * The independent air line under Reading is used at pressures far above those contemplated by Shelburne and the other devices, though within the physical capability of those devices. Again, the use of this excessive pressure is to be desired in applying liquid cement and to be avoided in applying paint.”

* * * * *

¹All emphasis ours unless otherwise stated.

“It is true, as appellant points out, that any mechanic can install an air inlet tube or regulate air pressure. But these steps were not taken in the manner and for the purpose contemplated by the Reading method until he discovered an advantage in doing so. When they were taken, new, unexpected, and extremely useful results were achieved.”

From the above quotations it is seen that the only novel steps of the Reading process are the use of an excess pressure of from 150 to 200 pounds in the independent air line and the formation of an emulsion of air in the cement. If these two steps are the novel features of the Reading invention, then they should be properly claimed. Limiting our consideration, in the present petition, to the excess pressure employed in the independent air line, let us examine the Reading patent to find what it says about the pressure in the independent air line.

The Reading specification makes only one statement with respect to the pressure of air in the independent air line, stating that it is a pressure of “about 150 to 200 pounds per square inch”. (Ex. 1, Col. 4, lines 33 and 34, R. 706). This Court recognized that the use of this pressure was one of the novel features of the Reading invention. We submit that such a pressure is critical to the practice of the Reading invention and is a necessary part of said process.

CLAIMS ARE FREE FROM AMBIGUITY.

We submit that the language of each of the claims of the Reading patent is clear and understandable and is free from ambiguity.

What do the claims of the Reading patent say with respect to the pressure to be used in the independent stream of air?

The process defined in claim 1 is as follows:

“A method of applying rubber cement which includes an inflammable solvent,

comprising forming an emulsion of air in the cement in a dispersion zone by introducing said air under pressure into a substantial body of cement maintained in said zone at superatmospheric pressure continuously withdrawing a stream of the emulsion from the dispersion zone,

forming an independent stream of air,

continuously mixing the emulsion stream with said independent stream of air in a mixing zone,

and continuously directing the resulting mixture of emulsion and air onto a surface to form a thin uniform coating of rubber cement thereon.”

The process of claim 2 is the following:

“A method of applying rubber cement which includes an inflammable solvent,

comprising introducing a measured amount of the cement into a dispersion zone,

introducing a quantity of air at superatmospheric pressure into the cement under emulsion conditions to form a stable dispersion of gas and cement under pressure,

continuously withdrawing a stream of the emulsion from the dispersion zone,

continuously withdrawing a separate stream of air from a source of air under superatmospheric pressure,

continuously mixing the streams of emulsion and said separate stream of air in a mixing zone to form a spray of emulsion suspended in air, and continuously directing the resulting spray onto a surface to form a thin uniform coating of rubber cement thereon.”

Claim 3 defines the process in the following way:

“A method of applying rubber cement comprising introducing a measured amount of liquid rubber cement composition comprising an elastomer and an inflammable solvent into an enclosed dispersion zone,
introducing a quantity of air into the cement under conditions to form an emulsion of air in the liquid cement at a pressure in the range of about 5 pounds to about 200 pounds per square inch,
continuously withdrawing a stream of the emulsion from the dispersion zone,
continuously withdrawing a separate stream of air from a source of air under superatmospheric pressure,
continuously mixing the streams of emulsion and air in a mixing zone to form a spray of emulsion suspended in gas,
and continuously directing the resulting spray onto a surface to form a thin uniform coating of rubber cement thereon.”

Claim 4 defines the process as follows:

“A method of applying rubber cement to a surface comprising
introducing about 2.5 volumes of liquid rubber cement composition comprising rubber and an in-

flammable solvent into an enclosed dispersion zone of about 3.0 volumes capacity,

introducing a quantity of air into the liquid cement under conditions to form an emulsion of air in the cement at a pressure in the range of about 5 pounds to about 200 pounds per square inch,

continuously withdrawing a stream of the emulsion from the dispersion zone,

continuously withdrawing a stream of air from a source of air under superatmospheric pressure,

continuously mixing the streams of emulsion and air in a mixing zone to form a spray of emulsion suspended in air containing of the order of a fraction of an ounce of cement to several cubic feet of air,

and continuously directing the resulting spray onto a surface to form a thin uniform coating of rubber cement thereon."

It is submitted that the above quoted claims are free from ambiguity. No contention has ever been made that the claims are ambiguous. On the contrary, the claims have always been considered free from ambiguity.

Let us now examine these claims to determine whether or not they overclaim the invention with particular reference to the pressures called for in said claims for the independent stream of air. Just what pressures are included in each of said claims for the independent stream of air by the language employed therein?

Claim 1 calls only for "forming an independent stream of air". No pressure whatsoever is here specified. In applying this language to a process of spraying rubber

cement, a pressure of from 1 pound per square inch on up to the highest pressure obtainable is included. Would the practicing of a process of spraying rubber cement using all of the steps of the Reading process, except using one pound pressure on the independent stream, be an infringement of the Reading patent? Suppose the pressure in the independent stream of air was raised to 5 pounds, 10 pounds, 30 pounds, 60 pounds, 120 pounds, 140 pounds, 210 pounds or, for example, say 1000 pounds—would this be the Reading process? The invention defined by Claim 1 includes all of the above pressures. The metes and bounds of an invention are described by the claims of the patent. Claim 1 of Reading contains no limitation whatsoever respecting the pressures to be employed in the independent air line. We submit, therefore, that Claim 1 does not properly point out and distinctly claim the Reading invention but rather overclaims the invention. Said claim, being free from ambiguity, is invalid as a matter of law.

Let us now examine Claims 2, 3 and 4 and determine what pressures are called for in the independent stream of air in these three claims. Each of these claims calls for the air in the independent stream to be “air under superatmospheric pressure”. What does “superatmospheric pressure” mean? Atmospheric pressure at sea level is 14.6974 pounds per square inch (Hackh’s Dictionary, 3rd Edition, Page 82, Definition of “Atmosphere”). A pressure of 15 pounds at sea level would be superatmospheric pressure. Therefore, if one used all of the steps of the Reading process employing a pressure of *only 15 pounds* per square inch in the independent air

line, he would infringe Claims 2, 3 and 4 of the Reading patent. Likewise, if one employed *any pressure over 14.6974 pounds* per square inch, he would infringe these claims. Again we submit Claims 2, 3 and 4 overclaim the Reading invention. These claims are free from ambiguity. Therefore, they should of themselves “particularly point out and distinctly claim” Reading’s invention. In overclaiming the invention, we submit each of said claims, as a matter of law, is invalid.

**THE PATENT IN SUIT IS INVALID, AS A MATTER OF LAW, FOR
FAILURE TO COMPLY WITH THE PROVISIONS OF SECTION
112 OF TITLE 35, UNITED STATES CODE.**

Section 112 of Title 35 U.S.C.² requires that the specifications contain a sufficient description of the invention to enable one skilled in the art to make and use the same and, in addition, requires that the claims must particularly point out and distinctly claim what the invention is. This defense is not a technical defense and has frequently been upheld by the Courts. The necessity of a proper disclosure and a proper claiming of the invention, to enable the public to make and use the invention after the monopoly

²The specifications shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. * * *

has expired, is one of the major considerations for the issuance of a patent to an inventor. The metes and bounds of the patent must be set forth in order that those skilled in the art may know what monopoly is asserted and to enable them to use other processes, structures and devices not covered by said monopoly.

Schriber-Schroth Co. v. Cleveland Trust Co., 83 L. Ed. 34, 39, 305 U.S. 46

General Electric Co. v. Wabash Appliance Corp., 82 L. Ed. 1402, 1405, 304 U.S. 364

United Carbon Co. v. Binney & Smith Co., 87 L. Ed. 232, 237, 317 U.S. 228

With reference to the claims of the Reading patent, they do not define or set forth the particular part of the process which causes the combination of the steps of the process to accomplish the claimed function and result relied upon by Reading to support the claims. The claims are not limited to any particular pressure in the independent stream of air going to the spray gun. Mr. Reading testified (R. 364-365) that the pressure employed in the independent stream of air is critical, stating:

“Q. Now, is it your contention that the bypass pressure that you employ in your independent stream of air is critical in the practice of your process?

A. Yes; in a sense it is critical. It has to be. May I explain that?

Q. Yes; go ahead.

A. It has to be high enough in pressure so that it avoids cobwebbing of your material as it comes out of the gun, and it has to be high enough that it drives the cement deeply into the buffed pores of the tire.’”

This Court, in holding the claims valid, reads into them certain pressure limitations which are necessary to properly limit and define Reading's invention.

There is no place in the claims where there is any definition of the invention which would enable an alleged infringer to know what he was infringing. There is nothing in the claims by which an alleged infringer could determine what pressures he could use in his independent air stream to avoid infringement of the claims. The excess pressure of air in the independent air line is the critical step in the Reading process which this Court in its opinion (pages 4 and 5) states makes possible "an exceedingly thin coating of rubber cement", which cement "dries quickly", results in "saving time and avoiding the dust, moisture and health hazards"; it "also aids in overcoming the cobwebbing effect" and finally causes the mixture of cement and solvent to "retain an air volume above the flammable limits of the solvent". The claims, however, fail to advise the public what pressure to use to accomplish all these results or, just as important, there is nothing in the claims which permits a person to determine what pressures can be employed to avoid infringement.

Undoubtedly, the question of infringement is predicated upon varying degrees of the pressure employed in the independent stream of air. If the question of degree is important, it must be set forth and must be claimed so as to enable the public to know the limits of the claimed invention.

Minerals Separation, Ltd. v. Hyde, 242 U.S. 261,
37 S. Ct. 82

It is submitted that, as a matter of law, the defense of failure to comply with the provisions of Section 112, upon the record, is sufficient to invalidate the claims of the Reading patent and this Court should grant a rehearing herein.

**THIS COURT INCORRECTLY APPLIED THE LAW IN
HOLDING THE READING CLAIMS VALID.**

This Court, in validating the claims, stated on page 12 of its opinion the following:

“Appellant challenges the legal sufficiency of the specific claims set out in Reading’s patent. In our view, however, the stated claims of the patent read in the light of the patent specifications are legally sufficient within the meaning of 35 U.S.C.A., § 112.”

The question of law here involved is whether or not, where the claims are free from ambiguity, reference may be had to the specifications for the purpose of interpreting and limiting the claims. Each of the claims of the Reading patent, as stated in the patent, is clear, understandable and free from ambiguity.

We believe the analysis of the claims hereinabove set forth establishes that so far as Claim 1 is concerned, any pressure whatever in the independent air line, from 1 pound per square inch on up to infinity, comes within the scope of said claim. Similarly, with respect to Claims 2, 3 and 4, any pressure whatsoever in the independent air line, from 14.6974 pounds per square inch on up to infinity, comes within the scope of these claims.

Unquestionably, in rendering its decision, this Court did not appreciate nor apply the doctrine of patent law

recently expressed by the Supreme Court of the United States in the case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535, which doctrine was adopted and applied by this Court in the case of *Winslow Engineering Company v. Smith*, 223 F. 2d 438.

As we have heretofore stated, one of the important contributions that Reading made in the spray art, and a critical point of novelty of his invention, is the use of from 150 to 200 pounds pressure in the independent stream of air. The claims should in and of themselves particularly point out and distinctly claim this contribution or invention of Reading's. In this they fail.

We submit, in view of the fact that the claims of the Reading patent are free from ambiguity, it is improper, as a matter of law, to refer to the specifications to limit the claims so they can be considered valid and thus define the invention of Reading. Therefore, when this Court stated, in its opinion: "In our view, however, the stated claims of the patent read in the light of the patent specification are legally sufficient within the meaning of 35 U.S.C.A., Section 112.", it violated the provisions of 35 U.S.C.A., Section 112, as interpreted and applied by the Supreme Court and a previous decision of this Court.

The proper application of the statute to the instant case is that expressed in the *Graver Tank* case, *supra*, wherein the Supreme Court, in reversing the Court of Appeals, which construed the claims in question as narrowed and limited by the specification, said:

"The difference between the District Court and the Court of Appeals as to these findings comes to this: The trial court looked at claims 24 and 26 alone and

declined to interpret the terms 'silicates' and 'metallic silicates' therein as being limited or qualified by specifications to mean only the nine metallic silicates which had been proved operative. The District Court considered that the claims therefore were too broad and comprehended more than the invention. The Court of Appeals considered that because there was nothing in the record to show that the applicants for the patent intended by these claims to assert a monopoly broader than nine metallic silicates named in the specifications, the court should have construed the claims as thus narrowed and limited by the specifications.

The statute makes provision for specifications separately from the claims and requires that the latter 'shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.' R.S. § 4888, as amended, 35 U.S.C. § 33, 35 U.S.C.A. § 33. It would accomplish little to require that claims be separately written if they are not to be separately read. While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to 'particularly point out and distinctly claim' an identifiable invention or discovery. We have frequently held that it is the claim which measures the grant to the patentee. See, for example, *Milcor Steel Co. v. George A. Fuller Co.*, 316 U.S. 143, 145, 62 S. Ct. 969, 970, 86 L.Ed. 1332; *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369, 58 S. Ct. 899, 901, 82 L. Ed. 1402; *Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U.S. 477, 487, 55 S. Ct. 455, 459, 79 L. Ed. 1005. While the cases more often have dealt

with efforts to resort to specifications to expand claims, it is clear that the latter fail equally to perform their function as a measure of the grant when they overclaim the invention. When they do so to the point of invalidity and are free from ambiguity which might justify resort to the specifications, we agree with the District Court that they are not to be saved because the latter are less inclusive. Cf. *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 373, 374, 58 S. Ct. 899, 903, 904, 82 L. Ed. 1402; see *McClain v. Ortmayer*, 141 U.S. 419, 424, 425, 12 S. Ct. 76, 77, 78, 35 L. Ed. 800; *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U.S. 399, 410, 25 S. Ct. 697, 702, 49 L. Ed. 1100."

It is clear from this *Graver Tank* decision that reference to the specifications cannot be made to limit the claims when said claims are free from ambiguity.

This Court in the case of *Winslow Engineering Company v. Smith*, 223 F. 2d 438, had occasion to apply the Supreme Court's doctrine enunciated in the *Graver Tank* case and in doing so followed the rule that where the claims are free from ambiguity, the claims themselves must particularly point out and distinctly claim the invention without reference to the specification, stating at page 442 the following:

"The difficulty which the appellant here confronts relates to the statement of its claims which were three in number. Claim 1 is representative and reads as follows: '1. An oil conditioner element comprising a cylindrical body with a central cylindrical, hollow, rigid, perforate core, a tubular fabric casing having its ends secured to corresponding ends of the core, the ends of the fabric casing passing over the

respective ends of the core, the means for securing said ends of the tubular fabric comprising plugs for frictionally holding the fabric against the interior of the core, and a compacted mass of filtering material within the space enclosed between the casing and core, at least one of said plugs being hollow to afford communication with the interior of the core.' It will be noted that there is no reference in this claim to any part or feature suggestive of the growth factor to which we have previously referred and about which Winslow undertook to build its invention. The claim does not allude to the growth or expansion of the filtering material; nor is there any allusion to any knitted fabric, the reference being to a 'tubular fabric casing'. Appellant concedes that an ordinary woven fabric, not knitted, would not infringe its patent. It is apparent that the language quoted from Claim 1 would be equally descriptive of filters conforming to the prior art.

The appellant says that notwithstanding this condition of the statements of its claims, they must be read as incorporating the real invention as found in the specification and drawings. It says: 'The specification may be referred to in order to limit the claim'.

It is true that the specifications when read with the drawings, if added to or incorporated in these claims would accomplish the required limitation necessary to specify the combination constituting the invention. The description in the specifications clearly refers to 'a porous knitted sleeve of fabric', and in describing the elements states that it is 'flexible and normally grows in volume as deleterious substances are collected and absorbed within the body of the element'. It refers to the growing action which 'naturally opens

up the porosity on the exterior surface which not only prevents clogging of the outside surface but almost continuously presents new exposed surfaces of the unused chemically treated purifying materials within the body of the element itself.' ”

Note the similarity of the critical phrases employed in the Winslow claims and the Reading claims. The Winslow claims call for “tubular fabric casing” while the Winslow specification refers to “a porous knitted sleeve of fabric” that is “flexible and normally grows in volume as deleterious substances are collected and absorbed within the body of the element”, and then describes the growing action of the casing which “naturally opens up the porosity on the exterior surface which not only prevents clogging of the outside surface but almost continuously presents new exposed surfaces of the unusual chemically treated purifying materials within the body of the element itself.” The Reading claim calls for “an independent stream of air” (Claim 1) or “air under superatmospheric pressure” (Claims 2, 3 and 4), while the specification refers to “The pressure of the compressed air fed to the spray gun 27 is set at about 150 to 200 pounds per square inch . . .” (Ex. 1, Col. 4, lines 32-34, R. 706). This reference to “150-200 pounds per square inch” is the only statement in the patent respecting the pressure employed in the independent air line.

Applying the *Graver Tank* case rule of law to the *Winslow* case, this Court said:

“We think, however, that *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 277, 69 S. Ct. 535, 538, 93 L. Ed. 672, compels us to hold that

these claims are invalid. In that case the district court had held that certain of the claims were too broad and comprehended more than the invention. The court of appeals disagreed holding that the claims should be held to be limited to certain items named in the specifications and said that the district court should have construed the claims: 'as thus narrowed and limited by the specifications.' The Supreme Court said, 336 U.S. at page 277, 69 S. Ct. at page 538: 'The statute makes provision for specification separately from the claims and requires that the latter "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."' R.S. § 4888, as amended, 35 U.S.C. § 33, 35 U.S.C.A. § 33. It would accomplish little to require that claims be separately written if they are not to be separately read. While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to "particularly point out and distinctly claim" an identifiable invention or discovery. We have frequently held that it is the claim which measures the grant to the patentee. * * * While the cases more often have dealt with efforts to resort to specifications to expand claims, it is clear that the latter fail equally to perform their function as a measure of the grant when they overclaim the invention. When they do so to the point of invalidity and are free from ambiguity which might justify resort to the specifications, we agree with the District Court that they are not to be saved because the latter are less inclusive.'

We are unable to note here any ambiguity in the claims in question. Hence, in this respect, we find

ourselves in the position of the Court of Appeals of the Seventh Circuit in *Borg-Warner Corp. v. Mall Tool Co.*, 217 F. 2d 850, 856. There the court, which had been reversed in the *Graver Tank & Mfg. Co.* case, *supra*, noting that there was no ambiguity in the claims there in question, said that 'to limit those words * * * by reference to the specifications seems to us to go beyond what we are permitted to do under the Supreme Court's decision in the *Graver* case.'

In *Payne Furnace & Supply Co. v. Williams-Wallace Co.*, *supra* [117 F. 2d 828], in suggesting that 'the drawings and specifications elucidate the claims', and that certain limitations were 'implicit in the spirit of the invention claimed', we commented upon the desirability of not striking down 'a meritorious invention.' In view of the decision in the *Graver* case, we do not feel that we can do here what we did in the *Payne Furnace* case, regardless of the meritorious character of the *Winslow* invention.

We hold therefore that the appellant's claims are invalid for failure to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery', or, as the new statute puts it, it has failed to conclude with claims 'particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.' ''

We submit that the rule of law expressed by the Supreme Court in the *Graver Tank* case, and properly applied by this Court in the *Winslow* case should have been applied in this case. If this had been done, then the *Reading* claims would have been declared invalid. In view of the *Graver Tank* and *Winslow* decisions, this Court, as a

matter of law, committed error in referring to the specifications to limit the Reading claims in order to save the patent. Without reference to the specifications, the Reading claims are guilty of overclaiming Reading's invention and are invalid. This Court's decision in the instant case is directly contrary to the Supreme Court's decision in the *Graver Tank* case and this Court's decision in the *Winslow Engineering* case.

It is submitted that this Court should grant a rehearing and should apply the doctrine of the *Graver Tank* and *Winslow* cases to the instant case.

Dated, San Francisco, California,
March 24, 1959.

Respectfully submitted,

MELLIN, HANSCOM & HURSH,
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Attorneys for Appellant.

NO. 15590

✓
See p. 100
Vol. 3085

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as **WILLIAM NIUKKANEN**, also known as **WILLIAM ALBERT MACKIE**,

Appellant,

v.

E. D. McALEXANDER, Acting District Director,
Immigration and Naturalization Service,
Department of Justice,

Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court
for the District of Oregon.*

FILED

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United States
COURT OF APPEALS
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WILLIA NIUKKANEN, also known as WILLIAM
NIUKKANEN, also known as WILLIAM ALBERT
MACKIE,

Appellant,

v.

E. D. McALEXANDER, Acting District Director,
Immigration and Naturalization Service,
Department of Justice,

Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court
for the District of Oregon.*

TO THE HONORABLE ALBERT LEE STEPHENS,
RICHARD H. CHAMBERS and FREDERICK
G. HAMLEY:

Comes now appellant, Willia Niukkanen, and respectfully petitions the above Court for a rehearing of his appeal in which an opinion affirming the judgment of the District Court was filed April 6, 1959, for the following reason and upon the following ground:

1. The Court erred in affirming the judgment of the District Court in that it failed to consider the question of whether the Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, now Section 1251 (a) (6) (c), Title 8, United States Code, is unconstitutional as a bill of attainder.

2. The Court erred in finding that the instant case does not fall within the rule of *Rowoldt v. Perfetto*, 355 U.S. 115.

ARGUMENT

1. Section 22 of the Internal Security Act of 1950 is an unconstitutional bill of attainder.

In the Court's opinion (p. 4) it is said:

"The contention that the Act under which the deportation order was entered is unconstitutional as applied to Mackie is identical with a similar contention made on the previous appeal. It was there disposed of adversely to Mackie and will not be re-examined at this time."

It is true that in the previous appeal the constitutionality of the Act was questioned but the record is clear that the Court refused to consider this question on the ground that the issues had been foreclosed by *Galvan v. Press*, 347 U.S. 522, and *Harisiades v. Shaughnessy*, 342 U.S. 580.

In fact, as the Petition for Rehearing in the previous appeal indicates, the Court upon oral argument gave notice to counsel that it would not consider any constitutional arguments.

Nowhere in the decision of the Court on the previous appeal was there any discussion of the constitutional issues. It is fair to say therefore that while the constitutional issues were raised in the previous appeal, they were never actually passed upon the Court or decided by it.

We are aware that *Galvan* and *Harisiades* purport to overrule the constitutional objections of appellant except insofar as they relate to the issue of whether the Act is a bill of attainder.

The question of whether the Act is a bill of attainder was never discussed or decided in *Galvan* or *Harisiades*, or in any case in the Supreme Court since.

We believe that the constitutional issues as they apply to a deportation order affecting a man who has lived virtually all of his life in this country, since the age of nine months, and who speaks no Finnish, but only English, should be carefully considered by the Court at some point in his litigation. Up to now, no Court has in fact directly ruled on this constitutional point.

In the recent case of *United States v. Lovett*, 328 U.S. 303, the Supreme Court clarified its definition of a bill of attainder. It said:

"They (*Cummings* and *Garland* cases) stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the constitution." (327 U.S. at 305.)

Section 1251 (a) (6) (c) possesses all of the attributes of a bill of attainder. It outlaws by legislative fiat the individuals of a named and ascertainable group and inflicts punishment upon them without judicial trial.

It is clear that the constitutional injunction against bills of attainder applies alike to aliens and citizens. The Supreme Court has repeatedly declared that an alien lawfully here is entitled to the same constitutional safeguards to protect his life, liberty, and property as a citizen. *Lem Moon Sing v. U.S.*, 158 U.S. 538, 547; *Wong Wing v. U.S.*, 163 U.S. 228, 238; *Yick Wo v. Hopkins*, 118 U.S. 356, 369.

There is no merit in the contention that the Act is constitutional because deportation does not constitute criminal punishment. The fact that deportation inflicts literal punishment has been affirmed by the courts repeatedly. *Bridges v. Wixon*, 326 U.S. 135, 154; *U.S. Ex Rel Klonis v. Davis*, 13 F. 2d 630 (CA 2, 1926); *Ng Fung Ho v. White*, 259 U.S. 276, 284. The cases also hold that legislation imposing no criminal punishment whatsoever can be unconstitutional as a bill of attainder solely because it deprives individuals of various rights, privileges and salaries. *U.S. v. Lovett*, 328 U.S. 303; *Ex Parte Garland*, 4 Wall. 333, 337; *Pierce v. Carskadon*, 83 U.S. 234; *Cummings v. Missouri*, 4 Wall 277.

The fact that there have been few cases in the United States' judicial history declaring legislative acts unconstitutional for being bills of attainder demonstrate that the doctrine has had deep and widespread accep-

tance by legislative and executive branches of our government.

We submit that the legislation which we here challenge falls squarely within the time honored principle condemning bills of attainder. We urge this Court to reconsider this case and uphold this bulwark of human freedom by declaring this portion of the Act unconstitutional.

2. Without repeating his argument, appellant reaffirms his position that the evidence in his case does not justify deportation under *Rowoldt v. Perfetto*, supra.

CONCLUSION

For the foregoing reasons we respectfully urge the Court to grant a rehearing of this case. We also suggest to the Court the possibility that such a rehearing be held *en banc* on account of the serious constitutional question raised by it.

Respectfully submitted,

NELS PETERSON and
GERALD H. ROBINSON,
Counsel for Appellant.

See also Vol. 3072

No. 15,994

United States Court of Appeals
For the Ninth Circuit

CHARLES CROWTHER and

IVY L. CROWTHER,

Appellants,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANTS' REPLY BRIEF.

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No. 15,994

United States Court of Appeals For the Ninth Circuit

CHARLES CROWTHER and

IVY L. CROWTHER,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPELLANTS' REPLY BRIEF.

I.

RESPONDENT IS IN ERROR IN CONTENDING THAT
APPELLANT'S JOB SITES ARE NOT TEMPORARY.

Respondent concedes that a taxpayer who travels between his residence and a temporary job site outside the city, or equivalent general area in which said residence is located, may deduct the cost of such travel, and in that regard respondent states at page 10 of his brief:

“Similarly, while an exception to the general rule has been recognized in certain cases where a taxpayer travels between his residence and a temporary job site, the exception has no application here. The taxpayer in this case was not working at temporary job sites, but was engaged in log-

ging activities at his usual post of duty or place of employment.”

The respondent, at pages 19-20 of his brief, cites with approval a decision of the Tax Court which stated that it

“recognized an exception to the general rule that a taxpayer’s principal post of duty is his tax ‘home’ which is to the effect that when that post of duty is temporary his family residence may be his tax ‘home’ and travel expenses to and from his temporary post may be deductible.”

Thus, respondent admits appellant’s residence would be his tax home and that his transportation expenses between his residence and job sites would be deductible if the job sites were temporary, but contends that appellant’s job sites were not temporary and therefore urges this Court to deny appellant’s appeal on that ground. Let us examine the authorities presented by appellants and respondent relative to the issue of temporary employment versus indefinite employment.

In appellants’ opening brief (Table of Authorities Cited, p. ii), we cited *Schurer v. Commissioner*, 3 T.C. 544, *Leach v. Commissioner*, 12 T.C. 20, *Frazier v. Commissioner*, 12 T.C.M. 1129, *Denning v. Commissioner*, 14 T.C.M. 838, and *Stegner v. Commissioner*, 14 T.C.M. 1081, and now cite *Kuris v. Commissioner*, Par. 56,163 P-H Memo. T.C., and *Selby v. Commissioner*, 14 T.C.M. 17, on the issue of temporary employment.

In *Schurer*, supra, a plumber took a job to assist in the construction of an ammonia plant, and his job lasted thirty-three weeks. The job was held to be temporary.

In *Leach*, supra, a construction worker was employed to work at various job sites for short periods ranging from a few weeks to several months, and the job sites were held to be temporary.

In *Frazier*, supra, an oil pipe paint machine operator was employed by one company at two different job sites, one assignment lasting eight weeks and the other twenty-three weeks, and both sites were held to be temporary.

In *Denning*, supra, a steamfitter was employed by one company for three months at one site and five months at another site, and was employed by another company for two months at a third site, and his job sites were held to be temporary.

In *Stegner*, supra, a plumber's job sites were all held to be temporary although one assignment lasted for fifty-five weeks, the Court saying at page 1082:

"The work at New Brunswick lasted some longer, but the employment there was clearly of a temporary nature."

In *Kuris*, supra, a plumber's assignment was held to be temporary although it lasted one year.

In *Selby*, supra, an accountant was employed to install and supervise an accounting system for a construction company, and his employment for the seven months required to perform the work was held to be temporary.

In each of the above cited cases the taxpayer sought to deduct traveling expenses, and the Commissioner unsuccessfully resisted the deduction on the ground the employment was of indefinite duration.

Certain principles can be drawn from these decisions, as follows:

1. The taxpayer followed a trade or profession in which assignments of short duration were common;
2. The taxpayer was not regularly engaged at any single location;
3. The taxpayer accepted employment or job assignments for various periods, none of which periods, in general, exceeded one year;¹
4. The employment at the job site terminated because there was no further work available at the site for the taxpayer, and not because he quit or was dismissed for improperly performing his duties.

Let us apply these principles to the facts of this appeal.

Appellant testified that falling and bucking is a temporary and seasonal job; that men engaged in the business often must take three, four, or five jobs in a single year (R. 140). The faller and buckler is assigned a layout to cut, and when it is cut over, he must move

¹In the Commissioner's Letter Ruling of May 4, 1956 (Par. 76,519—1956 Prentice-Hall Federal Taxes), the Commissioner stated:

"While the Service has not attempted to prescribe any specific period as representing a temporary period, employment of anticipated or actual duration of a year or more at a particular location would strongly tend to indicate 'indefinite' employment there."

to another layout (R. 163). During 1951, appellant had one employer for eleven months, but was assigned three different job sites (R. 164). His 1951 job terminated because of the annual suspension of logging operations and not because he quit or was dismissed for unsatisfactory performance (R. 164). Appellant's first 1954 employment lasted only seven months and involved two job sites (R. 166). The employment terminated because the employer completed its logging contract (Par. 165-166). His second 1954 employment lasted five months and involved two job sites (R. 166). The entire crew was released at the end of the year, which again was the time for the annual suspension of logging operations (R. 78; R. 164).

Respondent informs this Court that appellant's job sites are not temporary and then cites decisions which respondent contends present principles and facts similar to the appellant's case. Let us consider respondent's authorities.

Respondent relies mainly upon *Commissioner v. Flowers*, 326 U.S. 465, and *Peurifoy v. Commissioner*, 358 U.S. 59. In *Flowers*, supra, there was no issue presented as to temporary or indefinite employment, and the Supreme Court held that a distant commute expense is not deductible where occasioned by the personal convenience of the taxpayer. In *Peurifoy*, supra, the Supreme Court sustained the decision of the Court of Appeals that the employment was not temporary. The Court of Appeals opinion, 254 F. (2d) 483, provided at page 487 thereof:

“It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months.”

Thus *Peurifoy* establishes that if an employee quits a permanent or indefinite job within a relatively short period, the fact of quitting does not convert the job into a temporary job for federal income tax purposes. The facts of this decision are not in point in this appeal.

Respondent also cited, to support its contention that appellant's job sites were not temporary, *Ford v. Commissioner*, Par. 54,314 P-H T.C. Memo. Dec., in which a plumber's three-year job assignment was held not to be temporary; *Albert v. Commissioner*, 13 T.C. 129, in which a taxpayer's wartime employment and assignment by the War Department lasted two years and three months and was held not to be temporary; and *Claunch v. Commissioner*, 29 T.C. 1047, in which a taxpayer was employed to install three large boilers and the assignment lasted two years and was held not to be temporary.² These decisions, in-

²It should be noted that *Claunch* was employed on two other jobs, performing the same type of work, before securing the two-year assignment, which two jobs lasted three weeks and three months respectively, and the Commissioner agreed these were temporary jobs. Obviously it was the length of the assignment that was the decisive factor.

It should be further noted that despite the two-year duration of the assignment in issue, five members of the Tax Court dissented, urging the assignment was temporary and, in any case, the exigencies of the business necessitated the travel expense.

volving employment of indefinite duration which lasts for two or three years, are not in point.

We submit that the facts before this Court present an overwhelming demonstration of temporary job assignments and temporary employment.

II.

RESPONDENT IS IN ERROR IN CONTENDING THAT APPELLANT'S AUTOMOBILE EXPENSES IN ISSUE ARE NOT DEDUCTIBLE.

In the event this Court determines that appellant's job sites are temporary, as we respectfully believe it must, then the Court must conclude that appellant's transportation costs between his home and layouts are deductible under the facts of this appeal and the applicable law. We submit, however, that regardless of whether or not the job sites are temporary, appellant would still be entitled to deduct the transportation costs in issue. In appellants' opening brief (pp. 16-18) we cited *Emmert v. United States* and *Jasper v. United States* (1955), 146 F. Supp. 322, for the legal principle that a taxpayer could deduct the transportation costs between his residence and his place of business where two factors were present:

1. The taxpayer traveled a sufficient distance each day so as to be away from home, that is, outside the general area in which his "tax home" was located. (A distance of thirty miles was involved in the *Emmert* decision.)

2. Business necessity, and not personal convenience, necessity or desire, require that the daily travel expense be incurred.

Emmert was serving a six-year term as a judge of the Supreme Court of Indiana and thus did not have a temporary position, as "temporary" is defined by the tax decisions. The respondent admits the validity of the decision, which permitted Emmert to deduct his daily transportation costs, but urges that this decision is not applicable to the instant appeal because the travel was caused by the state law that the taxpayer live in one place and work in another place. We reassert our position that it was the fact that business necessity, and not personal convenience, desire or necessity, required the travel, that is the basis for the decision. The contention of respondent that the decision turns on the cause of the necessity, to wit, a state law, rather than the necessity itself, is not logical. Emmert, as did the other Supreme Court justices in his state, incurred daily traveling expenses because a condition existed whereby they could not live within reasonable proximity of their work. Emmert was allowed to deduct his daily traveling expenses. Crowther, as did the other buckers and fallers, incurred daily traveling expenses because a condition existed (that condition being the nature of their work) whereby they could not live within reasonable proximity of their work. Crowther, as well as Emmert, is entitled to deduct his daily transportation expenses. The faller and bucker and the judge did not incur daily transportation expenses because of per-

sonal choice, convenience, or necessity, but because the nature of their respective trade and profession required such expenses.

Respondent urges further that almost everyone finds it impossible to live close to their work, so that appellant's problem is not different from that of other taxpayers. Actually, every taxpayer can live in the city in which he works or can live and work within a reasonably confined area equivalent to a city. This is the basis of the general rule that the cost of going to and from work is not deductible (Appellants' Opening Brief, pp. 21-22). The fact that a taxpayer chooses to live in the suburbs, or in a different city from that in which he works, is no basis for a tax deduction for travel between his residence and his place of business.

Appellant was required each day to travel the distance herein involved because of the nature of his business. Respondent contends this was a personal necessity and not a business necessity and states that personal necessity does not control allowance of business deductions, citing *Commissioner v. Moran*, 236 F. (2d) 595 (C.A. 8th), *Commissioner v. Doak*, 234 F. (2d) 704 (C.A. 4th), and *United States v. Woodall*, 255 F. (2d) 370 (C.A. 10th). Respondent is correct that business necessity and not personal necessity controls, but this appeal presents a case of business necessity. He cites *Commissioner v. Moran*, supra, and *Commissioner v. Doak*, supra, which both involved appeals wherein a husband and wife claimed food and lodging costs they personally incurred at

the hotel they owned and managed. As the Court of Appeals stated at page 708 in the *Doak* decision:

“The expenses incurred by these taxpayers are expenses which everyone must incur to live, regardless of business requirements, and are, we think, personal and thus not deductible.”

In *United States v. Woodall*, *supra*, the taxpayer incurred expenses in moving himself and his family from Dallas, Texas, to Albuquerque, New Mexico, where he had accepted employment, and was denied the right to deduct said expenses. Such an expense is clearly not a business expense, but is similar to an expense in obtaining employment, which is not involved in this appeal. Thus, respondent's cited authorities are irrelevant. Lodging and food costs are not generally deductible because they represent expenses incurred in order to live and are therefore personal necessity expenses and not business expenses. Personal necessity exists when it is incurred by all people generally, regardless of occupation. (*Smith v. Commissioner*, 40 B.T.A. 1038, affirmed 113 F. (2d) 114 (C.A. 2d). Travel expenses are business necessities and are deductible when required by the nature of the business, and travel expenses include transportation expenses, lodging, food and incidental expenses.³ Appellant's automobile expenses, here in

³*Emmert v. United States* and *Jasper v. United States*, *supra*;
Frazier v. Commissioner, *supra*;
Leach v. Commissioner, *supra*;
Denning v. Commissioner, *supra*;
Schurer v. Commissioner, *supra*;
Stegner v. Commissioner, *supra*;

issue, were incurred by all the members of his trade in Mendocino County and were caused by the nature of his trade, and are therefore deductible business expenses.

III.

THE RULE OF HELVERING v. TAYLOR IS APPLICABLE TO THIS APPEAL, AND RESPONDENT'S NOTICE OF DEFICIENCY FOR 1951 WAS THEREFORE UNLAWFUL.

In appellants' opening brief, we cited *Helvering v. Taylor*, 293 U.S. 507, 55 S. Ct. 287, for the rule enunciated by the Supreme Court, set forth at p. 290, as follows:

"We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

We informed this Court in our brief (p. 33) that the *Helvering v. Taylor* decision was generally applied in cases involving arbitrary determinations of gross income, but we submitted to this Court, and now re-submit to this Court, our contention that an arbitrary determination of deductions or of gross income results in an arbitrary taxable income and the rationale of the Supreme Court decision must apply to deductions

Kuris v. Commissioner, supra;
Selby v. Commissioner, supra;
 Revenue Ruling 190, 1953-2 C.B. 303.

denied in an arbitrary or irrational basis as well as gross income determined in such a manner.

Respondent denies the applicability of *Helvering v. Taylor*, supra, to this appeal and cites *Zeddies v. Commissioner*, 3 A.F.T.R. (2d) 724 (1959) (7th C.A.) to support his position. In that decision the Internal Revenue Service conducted an audit of the taxpayer's affairs and arrived at a proposed deficiency. The taxpayer, before the Tax Court, established that certain determinations made by the Commissioner were excessive, and the Tax Court reduced the excessive determination based upon the evidence. The taxpayer contended that he was entitled to have the entire deficiency eliminated under the *Helvering v. Taylor* rule, but the Court rejected this contention and said at p. 728:

"We reject taxpayer's contention that he has established that the Commissioner's determination of deficiencies in his taxes were arbitrary and excessive or based on a formula which could not produce the correct amount of the tax due so as to bring this case within the rule laid down in *Helvering v. Taylor*, 293 U.S. 507."

In the *Zeddies* appeal, the taxpayer had obviously not established an *arbitrary* and *excessive* determination, but only an *excessive* determination. The Tax Court will often reduce the Commissioner's determinations, and this fact alone cannot possibly invalidate the entire determination.

In the instant case, the proposed 1951 deficiency was admittedly excessive, and in our opening brief

(pp. 33-35) we cited all the factors demonstrating arbitrary action and assessment. We submit that we have established the assessment therefore as both arbitrary and excessive and therefore void.

Respondent urges that all the harm done by his arbitrary action was overcome by the fact that the "Tax Court placed no reliance on the presumptive correctness of the Commissioner's determination, but redetermined from the facts presented to it the amount of income tax owed by this taxpayer." However, this is the Tax Court's duty in every tax case⁴ and therefore is no ground in this appeal for ignoring the law established by the *Helvering v. Taylor* decision.

The respondent's brief cites decisions establishing that the Commissioner's motives, policies and procedures are outside the Tax Court's jurisdiction, and this is a correct general statement of law. However, in exercising its jurisdiction to redetermine deficiencies, the Supreme Court has determined that the Tax Court cannot sustain a deficiency determination which is both arbitrary and excessive. In this case, the Tax Court has erred by sustaining such an arbitrary and excessive determination.

⁴After evidence is introduced by the taxpayer, the Commissioner's determination ceases to exist and the issue depends wholly upon the evidence.

San Joaquin Brick Co. v. Commissioner of Internal Revenue (1942), 130 F. (2d) 220, 9th C.A.;

Hemphill Schools v. Commissioner of Internal Revenue (1943), 137 F. (2d) 961, 9th C.A.;

Lawrence v. Commissioner of Internal Revenue (1944), 143 F. (2d) 456.

CONCLUSION.

We respectfully urge this Honorable Court that appellants are entitled to the modifications of the decisions of the Tax Court of the United States for 1951 and 1954, prayed for in the conclusion to appellants' opening brief (p. 36).

Dated, San Francisco, California,
May 11, 1959.

Respectfully submitted,

LEON SCHILLER,

MORRIS M. GRUPP,

Attorneys for Appellants.

**In the United States Court of Appeals
for the Ninth Circuit**

**CHARLES CROWTHER and IVY L. CROWTHER,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decisions of the
Tax Court of the United States**

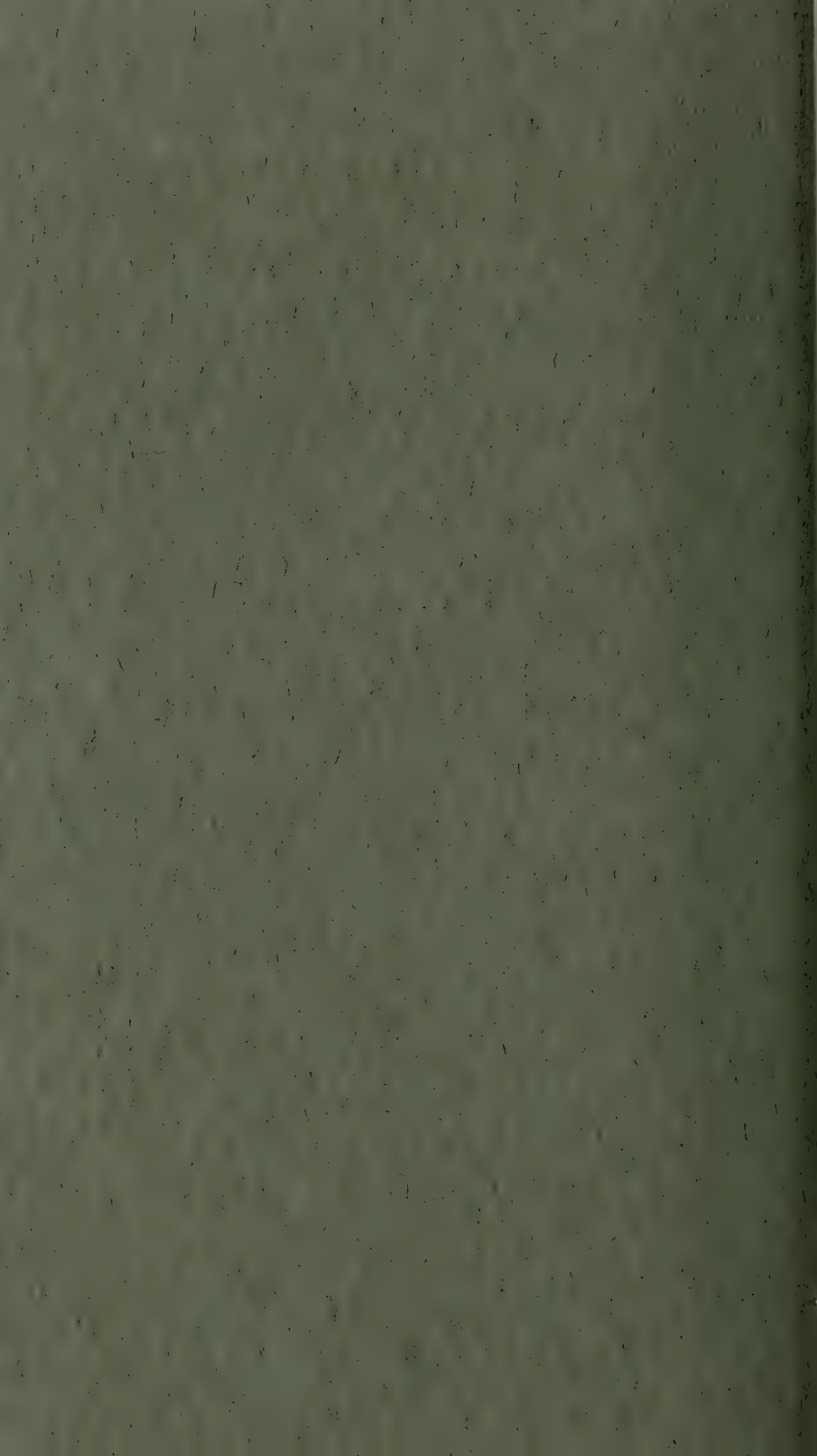
BRIEF FOR THE RESPONDENT

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APR 13 1959



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15994

**CHARLES CROWTHER and IVY L. CROWTHER,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 161-175) are officially reported at 28 T.C. 1293.

JURISDICTION

This petition for review (R. 178-181) involves federal income taxes for the taxable years 1951 and 1954. On March 8, 1955, the Commissioner of Internal Revenue mailed to the taxpayer¹ notice of a

¹ The term taxpayer when used herein refers to Charles E. Crowther. His wife, Ivy L. Crowther, is a party only because joint returns were filed.

deficiency for the taxable year 1951 in the total amount of \$324.76. (R. 8-11.) On January 12, 1956, the Commissioner mailed to the taxpayer notice of a deficiency for the taxable year 1954 in the total amount of \$191.40. (R. 23-26.) Within ninety days thereafter and on May 11, 1955 and April 10, 1956, respectively, the taxpayer filed petitions with the Tax Court for a redetermination of these deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939 and Section 6213 of the Internal Revenue Code of 1954. (R. 1-6, 13-22.) The decisions of the Tax Court were entered November 29, 1957. (R. 176, 177.) The case is brought to this Court by a petition for review filed February 24, 1958. (R. 178-181.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

During the years in question the taxpayer used two personally owned automobiles and a jeep to make daily trips from his residence to job sites where he was employed in falling timber and sawing it into logs. The Tax Court found that the taxpayer used the automobiles and the jeep for the dual purpose of commuting to the job site and for transporting tools used in his trade or business, and, accordingly, allowed as a trade or business expense deduction only those operating expenses attributable to transporting the tools. The questions presented are:

1. Whether the taxpayer was entitled to a deduction for that portion of the operating expenses at-

tributable to using his vehicles to commute between his residence and his job site under the provisions of Sections 23(a) and 24(a) of the Internal Revenue Code of 1939 and Sections 162(a) and 262 of the Internal Revenue Code of 1954.

2. Whether the Tax Court had jurisdiction to consider alleged administrative and procedural irregularities which purportedly occurred before the issuance of the statutory notice of deficiency.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as disclosed by the evidence and found by the Tax Court (R. 163-171) are summarized below:

The taxpayers, Charles E. Crowther and Ivy L. Crowther, husband and wife, are residents of Fort Bragg, California, and filed timely income tax returns for the calendar years 1951 and 1954. During these years, Charles E. Crowther was employed as a "faller" which occupation consisted of "falling" trees and "bucking" or sawing them into marketable logs at a stated amount per thousand board feet of logs. The taxpayer's employer would designate a certain boundary of timberland or "layout" upon which the taxpayer was to work. When one layout was cut over, another site would be designated, and so on until the employer's logging operations were

completed or suspended. The taxpayer was not required to work any specified number of days per week, nor was he required to report at any particular hour on days when he did work. During the years involved the taxpayer's average gross income was approximately forty dollars for each day he worked. (R. 163.)

The taxpayer provided certain equipment used in his employment consisting of one chain saw, an extra bar and an extra chain for the saw, a gasoline can, springboards, gun sticks, axes, sledge hammers, from 4 to 14 wedges, and minor tools and spare parts for on-the-job repairs. He also provided lubricating oil for the chain saw and a safety hat and caulk boots for personal wear. (R. 164.)

At the end of a day's work the taxpayer took home his gasoline can and any tools or parts of tools that were broken and in need of repair or sharpening. Spare tools such as a spare sledge hammer and a spare axe and spare wedges ordinarily would not be removed from the taxpayer's automobile and would be transported back and forth daily. The chain saw and other equipment would be left overnight at the layout. (R. 164.)

Beginning about the middle of January 1951 and continuing until its annual suspension of logging operations shortly before Christmas of that year, the taxpayer was employed by Rockport Redwood Mills which has its offices in Rockport, California. Rockport is on the Pacific coast about twenty-nine miles north of the taxpayer's residence in Fort Bragg. During 1951 the taxpayer was assigned to work at

three layouts between thirteen and fifteen miles from Rockport. To reach these layouts the taxpayer traveled over a paved highway to Rockport and then over one of two alternative routes which necessitated some travel over unimproved private logging roads. Rockport Redwood Mills furnished the taxpayer gasoline for his chain saw but did not furnish transportation to the layouts. There was no public transportation available between the taxpayer's home and these layouts. (R. 164-165.)

In 1954 the taxpayer worked as a faller and buckeer for two different companies. He worked for the H. A. Christie Company, Inc., of Ukiah, California, during the first part of 1954 and until July or August of that year when it completed its logging operations under the contract under which it had been operating. During this period the taxpayer was assigned work at two different layouts which were about four miles apart. To reach these layouts the taxpayer traveled about thirty miles south of Fort Bragg, about half this distance over a private logging road. The Christie Company did not provide transportation for its workers, nor was public transportation available. (R. 165-166.)

Within two or three days after the termination of his employment with the Christie Company, the taxpayer began working for Hildebrands, Inc., of Ukiah, California, where he continued to work for the remainder of 1954. During the first six weeks of this job the taxpayer worked at a layout which he reached by traveling over thirty-five miles of paved road and nine miles of logging road. For the

rest of the year he worked on another layout which he reached by driving over thirty-five miles of paved road and six miles of logging road. Hildebrands did not furnish transportation nor was public transportation available. (R. 166.)

Living accommodations were not available at the layouts where the taxpayer worked in 1951 and 1954. The taxpayer's employers did not impose any requirements as to where he and his family should live, nor did they specify the means he should employ in traveling to the layouts. Between jobs the taxpayer used his automobile to drive to various lumber mills to seek employment. (R. 166-167.)

In 1950 the taxpayer purchased for \$2,805 a 1947 model Cadillac which he has owned throughout the years in issue. About July 1951 he bought for \$125 a 1937 model Plymouth which was junked after being used for about a year. In November 1953 the taxpayer bought for \$400 a jeep which he owned throughout 1954. During 1951 before acquiring the Plymouth, the taxpayer used the Cadillac to go to and from work. After purchasing the Plymouth, he generally used it for driving to work since the Cadillac was not well suited for driving over logging roads, but during periods when the Plymouth was inoperable, the Cadillac was used. In 1954 the taxpayer generally used the jeep to go to and from work occasionally exchanging rides with a fellow worker who owned a jeep. On other occasions when the jeep was not operating, the taxpayer used the Cadillac. When the Cadillac was not being used by the taxpayer, Mrs. Crowther used it for shopping and

other personal reasons. The taxpayer generally worked six days a week in 1951 and five days a week in 1954. (R. 167-168.)

In their joint income tax returns for the years 1951 and 1954 the taxpayer and his wife reported a loss from rents and royalties of \$1,974.81 and \$837.97, respectively, which they deducted in computing taxable income. In "Schedule F.—Income from Rents and Royalties" it was stated that a portion of the taxpayer's wages during these years was for chain saw and equipment rental. The remainder of these schedules consisted of deductions claimed to be attributable to this rental income. The Tax Court found that during both years the taxpayer at all times kept possession of his chain saws and other equipment and used it himself in the course of his employment. He did not rent equipment to anyone during those years. (R. 168-170.)

The business expense deductions thus claimed by the taxpayer, those allowed by the Commissioner and the deductions allowed by the Tax Court are summarized below (R. 8-11, 23-26, 169-171):

1951

	<u>Claimed by Taxpayer</u>	<u>Allowed by Commissioner</u>	<u>Found by Tax Court</u>
Cadillac depreciation	\$701.00	\$140.20	\$210.00
Saw and equipment repairs	519.31	173.10 ²	519.31
Gas and oil	245.55	} 77.46	140.00
Insurance	141.75		42.00
Cost of Plymouth	125.00	0	30.00
Casualty Insurance	108.00 ³	0	28.00

1954 ⁴

Cadillac depreciation	\$702.00	\$ 0	\$ 70.00
Jeep depreciation	200.00	} 188.06	188.06
Jeep repairs	113.06		
Saw repairs	225.00	225.00	225.00
Parts	301.66	301.66	301.66
Gas	327.26	327.26	327.26
Oil	43.17	43.17	43.17
Insurance	92.80	92.80	92.80

The Tax Court's allowance of business expense deductions for the use of the taxpayer's automobiles and jeep was based on its finding that, with respect to his employment, the taxpayer used these vehicles for a dual purpose, i.e. commuting to and from work

² These costs were capitalized by the Commissioner and \$173.10 was allowed as a depreciation deduction. (R. 169.)

³ Claimed by the taxpayer as a casualty loss. (R. 169-170.)

⁴ With respect to the 1954 return, the Commissioner also disallowed \$33.08 of the \$44.20 which the taxpayer claimed as a deduction for medical expenses and disallowed a \$65 deduction for the preparation of a 1953 tax return. The Tax Court allowed the latter deduction and these matters are no longer in issue. (R. 171.)

and transporting tools used in his trade or business. Accordingly the Tax Court allowed a deduction for that portion of the expenses attributable to the latter purpose. (R. 172, 174.)

Based on these allowances the Tax Court redetermined the amount of the alleged deficiencies and entered decisions that there was a deficiency for the year 1951 of \$195.18 and an overpayment for the year 1954 of \$293.86. (R. 176, 177.)

In his petitions to the Tax Court (R. 1-7, 13-22) the taxpayer alleged in sweeping terms that the Commissioner and his agents had willfully committed major administrative and procedural indiscretions in waging "a campaign in the petitioners' locality in which the conduct, actions, and timing were abusive, arrogant, and deceitful" (R. 3), and praying that the allegedly arbitrary deficiencies be rejected in toto. The taxpayer introduced no evidence to support these charges other than an oral stipulation (R. 31) that the taxpayer did not receive a notice of proposed deficiency (30 day letter). On these facts the Tax Court found that it was without jurisdiction to consider such charges. (R. 175.)

SUMMARY OF ARGUMENT

I

The facts unequivocally show that during the years in issue the taxpayer used two automobiles and a jeep for the dual purpose of commuting to his usual place of employment and of transporting tools used in his trade or business. Under the applicable

sections of the Internal Revenue Codes the deductibility of automobile expenses is controlled by the purpose for which they were incurred and by their relationship to the taxpayer's trade or business. The cases clearly hold that commuting expenses are personal and not deductible. However, where such expenses have a dual purpose, a reasonable allocation must be made in order to compute the correct amount of the deduction, and the Tax Court's determination in this regard is without error.

The taxpayer incorrectly argues that the portion of automobile expenses attributable to commuting are deductible expenses incurred in travel "while away from home" under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 and Section 162(a)(2) of the Internal Revenue Code of 1954. "Home" within the meaning of these statutory provisions is the taxpayer's usual place of employment or post of duty, not his residence.

Similarly, while an exception to the general rule has been recognized in certain cases where a taxpayer travels between his residence and a temporary job site, the exception has no application here. The taxpayer in this case was not working at temporary job sites, but was engaged in logging activities at his usual post of duty or place of employment.

II

The taxpayer was not prejudiced because he was not furnished a so-called "30 day letter" or an auditor's report. These matters are part of the administrative procedures preliminary to the issuance of

a statutory notice of deficiency and have no pertinence to the problem before the Tax Court. The Tax Court's jurisdiction is limited to a redetermination of deficiencies stated in the statutory notice and it cannot allow a taxpayer to avoid payment of tax because of alleged ministerial shortcomings or irregularities.

ARGUMENT

I

The Tax Court Correctly Held That the Portion of Vehicle Operating Expenses Incurred In Commuting Between the Taxpayer's Residence and His Job Was a Nondeductible Personal Expense Under Section 24(a) of the Internal Revenue Code of 1939

This case concerns certain expenses incurred by the taxpayer in making daily trips from his residence in Fort Bragg, California, to and from certain "layouts" in the surrounding woods. The taxpayer was employed at these layouts as a faller and buckner—that is, he was engaged in falling trees and "bucking" or sawing them into logs of marketable size. The facts unequivocally show that the taxpayer used two automobiles and a jeep in commuting to his work at these sites. (R. 163, 166-168.)

Section 24(a)(1) of the Internal Revenue Code of 1939, Appendix, *infra*,⁵ provides that personal, living or family expenses shall not be allowed as deductions in computing net income "in any case". Con-

⁵ This provision was carried over without substantive change to the 1954 Code, Section 262 (Appendix, *infra*), which is applicable here to the year 1954.

sistent judicial and administrative authority have long held that the expenses which a taxpayer incurs in traveling to and from his regular place of employment are personal expenses which fall within the ban of this provision. Treasury Regulations 111, Sec-29.23(a)-2, Appendix, *infra*; Treasury Regulations on Items Not Deductible (1954 Code), Section 1.262-1(b)(5), Appendix, *infra*; *Commissioner v. Flowers*, 326 U.S. 465, rehearing denied, 326 U.S. 812; *Commissioner v. Peurifoy*, 254 F. 2d 483 (C.A. 4th), affirmed *per curiam*, 358 U.S. 59; *Donnelly v. Commissioner*, 262 F. 2d 411 (C.A. 2d); *Commissioner v. Janss*, 260 F. 2d 99 (C.A. 8th); *Ney v. United States*, 171 F. 2d 449 (C.A. 8th), certiorari denied, 336 U.S. 967; *York v. Commissioner*, 160 F. 2d 385 (C.A. D.C.).

In this case it was also established that in addition to using his vehicles to commute to and from work, the taxpayer furnished certain tools and equipment which he used on this job and that he carried such material to and from the job site in his car or jeep. (R. 164.) Accordingly, the Tax Court found that the taxpayer used these vehicles for the dual purpose of commuting to and from work and for transporting tools used in his trade or business. (R. 172.) Because the vehicles were used for this latter purpose, both the Commissioner and the Tax Court recognized that a portion of the operating expenses incurred by the taxpayer were deductible under Section 23(a)(1)(A), Appendix, *infra*, as ordinary and necessary expenses incurred by the taxpayer in carrying on a trade or business. In this respect the

Tax Court increased some of the allowances made by the Commissioner, stating (R. 174) :

In allowing a portion of the deductions taken for automobile and jeep expenses, the respondent has recognized, and we think properly so, that the automobiles and jeep, in addition to being used by Crowther to commute between his home and the various "layouts" at which he worked, also were used by him in his business or trade. In our opinion, the record, in some instances, warrants the allowance for such use of larger amounts than were allowed by the respondent. In those instances, we have found as best we could the amounts which constituted ordinary and necessary business expenses.

Whether a particular expense is deductible by a taxpayer depends, of course, on the purpose for which it was incurred, and, where there is more than one purpose, it is entirely proper to make a reasonable allocation in order to compute the correct allowance for expenses deductible under the statute. *Wagner v. Lucas*, 38 F. 2d 391 (C.A. D.C.) ; *Amoroso v. Commissioner*, 193 F. 2d 583 (C.A. 1st) ; *Bartholomew v. Commissioner*, 4 T.C. 341, appeal dismissed, 151 F. 2d 534 (C.A. 9th). In this case the Tax Court has made a permissible allocation on the facts of record.

In this Court the taxpayer apparently does not question the correctness of the finding that there was a dual purpose prompting these expenditures, nor does he raise objection to the proportionate amounts allocated by the Tax Court to each of these purposes. Rather, as we understand the argument, the taxpayer

urges that the portion of automobile and jeep expenses attributable to commuting to and from work is deductible under Section 23(a)(1)(A) as "traveling expenses * * * while away from home in the pursuit of a trade or business." In order to satisfy his burden of proving that he is entitled to this deduction,⁶ the taxpayer advances the theory that his residence in Fort Bragg was actually his "business headquarters" and was, therefore, his "tax home", so that each trip to the woods was travel "away from home" to a "temporary job site," resulting in deductible expenses under the theory advanced in cases such as *Schurer v. Commissioner*, 3 T.C. 544, and *Leach v. Commissioner*, 12 T.C. 20. The weakness of the taxpayer's theory lies not in the lack of validity of the cited case authority, but in the assumed applicability of this authority to these facts.

The Supreme Court has twice considered and rejected deductions for travel expenses claimed under similar theories. *Commissioner v. Flowers*, *supra*; *Peurifoy v. Commissioner*, 358 U.S. 59. In the *Flowers* case, the problem was considered in detail and the factual prerequisites for applicability of this deduction provision were carefully enumerated. These requirements are (p. 470):

⁶ The allowance of a deduction from gross income, of course, "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Co. v. Helvering*, 292 U.S. 435, 440; *Sparkman v. Commissioner*, 112 F. 2d 774, 778 (C.A. 9th). The burden of proving facts which show a right to the claimed deduction and to the amount claimed is upon the taxpayer. *Burnet v. Houston*, 283 U.S. 223.

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.⁷

It is clear that expenses incurred in driving between one's residence and his usual place of employment are not incurred "while away from home." It has been repeatedly recognized that "'home' as used in the statute means the taxpayer's principal place of business or employment." *O'Toole v. Commissioner*, 243 F. 2d 302, 303 (C.A. 2d). See also *Commissioner v. Janss*, *supra*; *Ney v. Commissioner*, *supra*; *Claunch v. Commissioner* (C.A. 5th), decided March 10, 1959 (3 A.F.T.R. 2d 906); *York v. Commissioner*, *supra*; *Bercaw v. Commissioner*, 165 F 2d 521 (C.A. 4th). That is, it is beyond dispute that "home" as used in Section 23(a)(1)(A) means

⁷ The Commissioner does not contend that the Supreme Court's decision in the *Flowers* case holds that the travel expenses of an employee are allowable as business deductions only where they are incurred in pursuit of his employer's business.

a taxpayer's post of duty, and not necessarily the place where he chooses to maintain a residence. Therefore, when a taxpayer is employed at his post of duty, he is not "away from home," and hence not entitled to deduct traveling expenses. In such a case, his expenditures for meals and lodging must be considered personal and living expenses which as pointed out above are made, expressly non-deductible under Section 24(a)(1) of the 1939 and Section 262 of the 1954 Codes. (Appendix, *infra*.) *Hammond v. Commissioner*, 20 T.C. 285, affirmed 213 F. 2d 43 (C.A. 5th); *Amoroso v. Commissioner*, 193 F. 2d 583 (C.A. 1st), certiorari denied, 343 U.S. 926; cf. *Commissioner v. Moran*, 236 F. 2d 595 (C.A. 8th).

The logic of the above rule seems inescapable. If a taxpayer's residence is his home within the meaning of this provision, then everyone's expense of getting to and from his work would be deductible under the statute, and in this context, the statutory prohibition against the deductibility of personal expenses would be deprived of all meaning. Moreover, this definition of "home" has not only received repeated judicial approval, but, as the Supreme Court noted in *Flowers* (fn. 5, p. 472), it is an administrative definition published as early as 1921. This administrative definition has been continued since the *Flowers* case,⁸ and has survived numerous statutory

⁸ I.T. 3842, 1947-1 Cum. Bull. 11; Rev. Rul. 54-147, 1954-1 Cum. Bull. 51; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul. 55-236, 1955-1 Cum. Bull. 274; Rev. Rul. 55-571, 1955-2 Cum. Bull. 44; Rev. Rul. 55-604, 1955-2 Cum. Bull. 49; Rev. Rul. 56-49, 1956-1 Cum. Bull. 152.

reenactments.⁹ Accordingly this long-standing administrative and judicial definition must be regarded as having received implied congressional approval. *Helvering v. Winmill*, 305 U.S. 79; *Taft v. Commissioner*, 304 U.S. 351; *Brewster v. Gage*, 280 U.S. 327. Indeed, this definition of "home" was brought forcefully to the attention of Congress. Prior to 1952, it was established that the "home" of members of Congress was in Washington, D. C., even though their family residences were located elsewhere. *Lindsay v. Commissioner*, 34 B.T.A. 840. Accordingly special legislation was required in order to view a Congressman's residence as his home for purpose of Section 23(a)(1)(A). Legislative Branch Appropriation Act, 1953, c. 598, 66 Stat. 464, 467.¹⁰ A similar provision was included in Section 162 of the 1954 Code, Appendix, *infra*. It is submitted that since the taxpayer in the instant case is not covered

⁹ Section 214(a)(1) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9); Section 23(a) of the Revenue Acts of 1928 (c. 852, 45 Stat. 791), 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447).

¹⁰ This provides in pertinent part—

That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State; congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purpose of section 23(a)(1)(A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of \$3,000.

by any such special provision his tax “home” must be regarded as his principal post of duty—i.e. the logging layout in the woods. Travel expenses incurred in commuting from one’s residence to and from his principal post of duty is, as noted above, a nondeductible personal expense. Treasury Regulations 111, Section 29.23(a)-2, Appendix, *infra*; Treasury Regulations on Items Not Deductible (1954 Code), Section 1.262-1(b) (5), Appendix, *infra*; *Commissioner v. Flowers*, *supra*; *Ney v. Commissioner*, *supra*. Further, it is urged that the above authorities negative completely the taxpayer’s suggestion (Br. 22) that under this Court’s decision in *Wallace v. Commissioner*, 144 F. 2d 407,¹¹ his “home” for the purpose of this deduction is his residence in Fort Bragg.

The taxpayer suggests (Br. 18) that since it was impossible for him to live closer to his work, a “business necessity” for these commuting expenses has been supplied. As a practical matter, it is impossible

¹¹ The *Wallace* case involved a taxpayer who lived in San Francisco, but for several months in 1939 worked on a movie in Hollywood. It was held that she was entitled to deduct the costs of food, rent and household expenses incurred in Hollywood as travel expenses while away from home. Even despite the opinion’s suggestion that “home” on these particular facts means residence, we submit that the opinion cannot be stretched so far as to allow commuting expenses as travel expenses while away from home. Actually, the *Wallace* opinion has never been accepted as a ruling that *in all circumstances* home means residence. We have been able to find only one case which cites it for that proposition, and in that case the deductions were denied for failure of proof. *Summerour v. Allen*, 99 F. Supp. 318 (M.D. Ga.).

for almost all commuters today to live close to their work. That is why we are daily witnessing the spectacle of millions of people traveling long distances by train and automobile to get to their work in the morning and back to their residences at night. But regardless of the distances these people may be called upon to travel every day, they remain commuters, and hence, in the sight of the statute and Regulations, such expenses are personal. Just as all employees have to have food and lodging, so must they make suitable arrangements for getting to and from work. The travel undertaken daily by the taxpayer here to get to and from his work was the result of his personal necessity to establish a residence where a residence was available. Personal necessity does not control the allowance of business deductions. Compare *Commissioner v. Moran, supra*; *Commissioner v. Doak*, 234 F. 2d 704 (C.A. 4th); *United States v. Woodall*, 255 F. 2d 370 (C.A. 10th), certiorari denied, 358 U.S. 324.

The second case which has been before the Supreme Court on the question here involved, *Peurifoy v. Commissioner, supra*, brings into focus the exception to the general rule relied on by the taxpayers herein. In that case the taxpayers were construction workers whose jobs were at Kinston, North Carolina, and whose personal residences were elsewhere in the State. In their tax returns they deducted amounts expended for transportation from Kinston to their personal residences and for food and lodging expenses at Kinston. In allowing the deductions, the Tax Court (29 T.C. 149) recognized an exception to

the general rule that a taxpayer's principal post of duty is his tax "home" which is to the effect that when that post of duty is temporary his family residence may be his tax "home" and travel expenses to and from his temporary post may be deductible. See *Leach v. Commissioner*, 12 T.C. 20; *Schurer v. Commissioner*, 3 T.C. 544. However, in the *Peurifoy* case the Court of Appeals for the Fourth Circuit (254 F. 2d 483) reversed as clearly erroneous the Tax Court's finding that the employment was temporary and held the expenses were not deductible, stating (pp. 486-487):

However justified he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary business expense within the meaning of § 23(a)(1)(A) if the employment is of substantial or indefinite duration.

The Supreme Court affirmed, stating that the Court of Appeals had made a fair assessment of the record.

We have reviewed the litigation in the *Peurifoy* case in some detail in order to demonstrate that the rule relied on by the Tax Court in that case and in similar cases is a strictly construed exception to the general rule prohibiting the deduction of personal expenses. See *Claunch v. Commissioner*, *supra*; *Commissioner v. Janss*, *supra*. Accordingly, the exception has no pertinence in cases such as this where the taxpayer was not assigned to a temporary post of duty away from his primary post, but was merely com-

muting from his residence to his regular job site.

Also contrary to the taxpayer's suggestion there is nothing in administrative rulings which would sanction the deductibility of the commuting expenses involved in this case. Indeed, in Treasury Publication No. 300 (1956 P-H Federal Taxes, par. 76,425), upon which taxpayer relies (Br. 27-28), the distinction is clearly made:

10. Question: I live in Nashville. I am regularly employed at a location 20 miles outside of the city. There are no living accommodations within a reasonable distance of my place of employment. May I deduct my expenses of traveling to and from work?

Answer: No. Expenses of getting to and from your regular place of employment are not deductible, regardless of the distance you commute.

11. Question: I live in Nashville and work for a construction company. Most of the time I work in the general area of Nashville. I have been temporarily assigned to work on a project about twenty miles from Nashville. I make daily round trips from my residence to this temporary job. May I deduct my transportation expense in making these daily round trips?

Answer: Yes. Provided your employer does not make free transportation to this temporary job available to you. These expenses of getting to and from your temporary assignment are deductible because your work is temporary and is outside the general area in which you usually work.

It is submitted that the taxpayer here has failed to adduce facts calling for the application of the temporary employment rule. To bring himself within this ameliorative exception, the taxpayer must not only show that his employment was actually short, but also that prior to its commencement it was anticipated to be short. *Ford v. Commissioner*, decided November 30, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,314), affirmed *per curiam*, 227 F. 2d 297; *Albert v. Commissioner*, 13 T.C. 129. Here, the taxpayer testified that his jobs lasted until he was laid off or until the employer had finished supplying logs under a contract. (R. 59-60, 72-73, 79.) He was employed by Rockport Redwood Mills for the entire taxable year of 1951, and in 1954 worked for Christie Company until July or August and finished the year working for Hildebrands, Inc. (R. 164, 165.) This latter job extended into 1955. (R. 166.) Thus, the jobs held by the taxpayer during these years were of substantial duration and were indefinite rather than temporary in contemplation. *Commissioner v. Peurifoy*, *supra*; *Claunch v. Commissioner*, *supra*.

The taxpayer's reliance (Br. 16-18, 20-21) on *Emmert v. United States*, 146 F. Supp. 322 (S.D. Ind.), and *Moss v. United States*, 145 F. Supp. 10 (W.D. S.C.), is similarly misplaced. These cases are limited to the situation where a taxpayer could live closer to his work but for a state law requirement that he live in a particular district and work in another. The commuting expenses incurred in situations of this type do not arise from the personal necessity of getting to and from work. They are

a necessary by-product of the legal requirement of state law that the taxpayer live in one place and work in another. The principle has no application here.

The taxpayer on brief (p. 30) has admonished us not to cite cases regarding the non-deductibility of commuting expenses, but requests authority to establish "that a taxpayer who must travel daily a distance of from 30 to 44 miles from his 'tax home' to a temporary job-site and return cannot deduct the cost of such transportation." Such statements show that the taxpayer's theory is premised on a distorted view of this record. The taxpayer here did not travel from his "tax home"—he traveled from his residence. He did not go to a "temporary job-site"—he went to his usual and principal place of employment or post of duty. He cannot deduct the costs of this travel because they are personal expenditures incurred in getting to and from work, and, as the Supreme Court stated in *Flowers*, (p. 473) the nature of the expenses remains the same whether a taxpayer travels three blocks or three hundred miles.

II

The Fact that the Taxpayer Was Not Furnished An Auditor's Report or a 30 Day Letter Was Not Prejudicial To His Rights

As we understand the taxpayer's argument on this point, it is that since the Commissioner did not issue a letter advising tentatively of a proposed deficiency (so-called 30 day letter) or furnish the taxpayer with an auditor's report (R. 31), the Tax Court should

have approved the taxpayer's returns as filed regardless of its conclusion that the taxpayer in fact owed more tax than he had reported. Such a proposal is without rational or legal justification.

The function of the Tax Court in cases such as this is to redetermine deficiencies officially determined by the Commissioner as set forth in the statutory notice of deficiency. It is the statutory notice, not the 30 day letter, which is the Commissioner's final determination and which confers jurisdiction on the Tax Court. Section 6213 of the Internal Revenue Code of 1954; Section 272(a) of the Internal Revenue Code of 1939; see *Commissioner v. Gooch Co.*, 320 U.S. 418. The existence or non-existence of an auditor's report, a 30 day letter, a ten day letter or any other matters of preliminary administrative activity is immaterial to the problem presented to the Tax Court *viz.* the redetermination of the deficiency in tax determined by the Commissioner.

In this case the Tax Court placed no reliance on the presumptive correctness of the Commissioner's determination, but redetermined from the facts presented to it the amount of income tax owed by this taxpayer. Contrary to the taxpayer's suggestion (Br. 33), there is no basis for the application in this context of the rule of *Helvering v. Taylor*, 293 U.S. 507. That rule is that when it is apparent on the facts that the Commissioner's determination is based on a formula which could not produce the correct amount of the tax, the erroneous deficiency will not be upheld because the taxpayer fails to prove the

amount of the tax due. As was recently stated by the Court of Appeals for the Seventh Circuit "The rule of *Helvering v. Taylor* does not prevent the Tax Court from exercising its function, in a proper case, of redetermining the deficiencies assessed by the Commissioner." *Zeddies v. Commissioner*, decided February 20, 1959 (3 A.F.T.R. 2d 724, 728).

The taxpayer's petitions to the Tax Court (R. 1-7, 13-22) contain a great many allegations concerning the manner in which the deficiencies were determined in this case, all of which were denied in the answers (R. 12, 27). It was alleged, *inter alia*, that the Commissioner knowingly issued false and arbitrary deficiency notices as a part of a campaign to force the wage earners of Mendocino County to use the standard deduction and to cast the taxpayer's tax consultant into disrepute. The most noteworthy thing about these allegations is the total lack of any attempt to substantiate them with either testimony or documentary evidence. Moreover, the propriety of the Commissioner's motives, policies and procedures has long been held to be outside the Tax Court's jurisdiction to redetermine deficiencies. *Kerr v. Bowers*, 66 F. 2d 419, 424 (C.A. 2d), certiorari denied *sub nom. Clegg v. Bowers*, 291 U.S. 663; *Cleveland Home Brewing Co. v. Commissioner*, 1 B.T.A. 87, 91. If the taxpayer feels aggrieved by such activity his remedy must lie elsewhere. *Greene v. Commissioner*, 2 B.T.A. 148. There is nothing in the revenue laws that excuses a taxpayer from paying a lawful tax on the ground of alleged administrative shortcomings or irregularities.

CONCLUSION

For the reasons stated above, the decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * traveling expenses (including the entire amount expended for meals and lodg-

ing) while away from home in the pursuit of a trade or business; * * *.

* * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [As amended by Section 127 (b), Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Internal Revenue Code of 1954:

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term “adjusted gross income” means, in the case of an individual, gross income minus the following deductions:

* * * *

(2) *Trade and Business Deductions of Employees.*—

* * * *

(B) *Expenses for travel away from home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of \$3,000.

* * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter no deduction shall be allowed for personal, living, or family expenses.

(26 U. S. C. 1952 ed., Supp. II, Sec. 262.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(a)-2 [as amended by T.D. 5458, 1945 Cum. Bull. 45] *Traveling expenses*.—

Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging are business expenses.

* * * *

A payment for the use of a sample room at a hotel for the display of goods is a business expense. Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. A taxpayer claiming the benefit of the deductions referred to herein must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the tax-

able year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

Commuters' fares are not considered as business expenses and are not deductible.

Treasury Regulations on Itemized Deductions for Individuals and Corporations (1954 Code):

Sec. 1.162-2 *Traveling expenses*.— * * *

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * *

Treasury Regulations on Items Not Deductible (1954 Code):

Sec. 1.262-1 *Personal, living, and family expenses*—(a) *In General*. In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Internal Revenue Code of 1954, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses*.

* * * *

(5) * * * The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses. Except as permitted under section

162 or 212, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

